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and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 88–25)

APPROVAL OF A COMMERCIAL GAUGER

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of approval as a commercial gauger.

SUMMARY: Pursuant to § 151.13, Customs Regulations (19 CFR 151.13), Dahl & Company, Inc., 214 N. Gulf Blvd. (P.O. Box 1121), Freeport, Texas 77541, has applied to Customs for approval to gauge imported petroleum and petroleum products and bulk liquid organic chemicals. Customs has determined that Dahl & Co. meets all of the requirements for approval.

Accordingly, Dahl & Company, Inc. is hereby approved to gauge imported petroleum and petroleum products and bulk liquid organic chemicals in all Customs districts.

EFFECTIVE DATE: May 2, 1988.

FOR FURTHER INFORMATION CONTACT: Roger J. Crain, Office of Technical Services, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202–566–2446).

Dated: May 11, 1988.

JOHN B. O'LOUGHLIN,
Director,
Office of Technical Services.

[Published in the Federal Register, May 20, 1988 (53 FR 18191)]

(T.D. 88–26)

ACCREDITATION OF A COMMERCIAL LABORATORY

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of accreditation of a commercial laboratory.

SUMMARY: Pursuant to § 151.13, Customs Regulations (19 CFR 151.13), Core Laboratories, 8210 Mosley Road, Houston, Texas 77075, has applied to Customs for accreditation to analyze imported petroleum and petroleum products for certain characteristics. Customs has determined that Core Laboratories meets all of the requirements for accreditation.

Accordingly, Core Laboratories is hereby accredited to analyze imported petroleum and petroleum products for the following characteristics: API gravity, Sediment and Water, and distillation characteristics in compliance with the Customs Regulations (19 CFR Chapter 1) in all Customs districts.

EFFECTIVE DATE: May 2, 1988.

FOR FURTHER INFORMATION CONTACT: Roger J. Crain, Office of Technical Services, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-2446).

Dated: May 13, 1988.

JOHN B. O'LOUGHLIN,
Director,
Office of Technical Services.

[Published in the Federal Register, May 20, 1988 (53 FR 18191)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
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Senior Judges

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Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 88–48)

CEMENTOS GUADALAJARA, S.A., CEMENTOS PORTLAND NACIONAL, S.A., AND CEMENTOS VERACRUZ, S.A., PLAINTIFFS, CEMENTOS ANAHUAC DEL GOLFO, S.A., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT

Court No. 86–12–01525

Before CARMAN, *Judge.*

[Plaintiffs' motion for summary judgment denied. Judgment entered for defendant.]

(Decided April 27, 1988)

Ross & Hardies, (Joseph S. Kaplan on the motion); and *O'Connor & Hannan, (David P. Darnell* of counsel on the motion) for the plaintiffs.

Rogers & Wells (Eugene T. Rossides Robert E. Ruggeri on the motion) for the plaintiff-intervenor.

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, (*Velta A. Melnbrencis,* Assistant Director, on the motion); and *Douglas A. Riggs,* General Counsel, *M. Jean Anderson,* Chief Counsel for International Trade Office of the Deputy Chief Counsel for Import Administration, U.S. Department of Commerce (*Craig L. Jackson,* of counsel on the motion) for the defendant.

Stewart and Stewart, (*Eugene L. Stewart, Terence P. Stewart, D. Scott Nance,* and *William A. Fennell* on the amici brief); Cabot Corporation, (*William L. May, Jr.,* of counsel on the brief); and PPG Industries, Inc. (*Glen Miller* of counsel on the brief) supporting defendant as amici curiae.

MEMORANDUM OPINION AND ORDER

CARMAN, *Judge:* Plaintiffs Cementos Guadalajara, S.A., Cementos Portland Nacional, S.A., and Cementos Veracruz (plaintiffs) commence this action pursuant to section 516A of the Tariff Act of 1930 (the Act) as amended 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c) (1986). The plaintiffs contest the Department of Commerce, International Trade Administration's (ITA) administrative review of its countervailing duty investigation pursuant to section 751 of the Act, as amended, 19 U.S.C. § 1675 (1986), (751 review), of cement and cement clinker from Mexico. *Portland Hydraulic Cement and Cement Clinker From Mexico; Final Results of Countervailing Duty*

Administrative Review, 51 Fed. Reg. 44500 (1986). The review under appeal covered entries made from January 1, 1984 through December 31, 1984 and was the second administrative 751 review of the countervailing duty order.[1] Plaintiffs brought the action to challenge the authority of the ITA to conduct a 751 review of the countervailing duty order (CVD order) on portland hydraulic cement and cement clinker (PHC) and to issue the results thereof. Plaintiffs' action also contests the authority of the ITA to conduct future 751 reviews based upon the order and to continue to direct the U.S. Customs Service (Customs) to collect estimated duty deposits on future entries. Plaintiffs' challenges rest on the issue whether or not the accession of Mexico to the GATT agreement should have effect on entries of the subject merchandise imported from Mexico into the U.S. at a date prior to Mexico's accession. Plaintiffs believe there is an effect, and its result should end in applying an injury determination requirement retroactively to goods entered before the accession date. Cementos Anahuac del Golfo, S.A. (plaintiff-intervenor), supports these assertions.

Plaintiffs now move for summary judgment, pursuant to Rule 56 of the rules of this Court, requesting the Court to: (1) direct the ITA to revoke the order; (2) direct the ITA to order Customs to refund all estimated duty deposits paid upon entries of the subject merchandise; and (3) direct Customs to stop collecting the estimated countervailing duty deposits on the entries of PHC.

Defendant Government urges the Court to deny plaintiffs' motion, enter judgment in favor of the defendant, and sustain the final results of the second 751 review of the CVD order on cement and cement clinker from Mexico. Amici curiae support defendant's position. Upon review of the material facts as to which there is no genuine issue, the Court denies plaintiffs' motion and enters judgment for defendant.

Facts

The following facts appear not to be in dispute. On March 8, 1983, the United States Department of Commerce (Commerce) received a petition filed on behalf of the United States producers of PHC. The petition alleged manufacturers, producers, or exporters of PHC in Mexico received, directly or indirectly, bounties or grants within the meaning of section 303 of the Act, as amended, 19 U.S.C. § 1303. On the basis of the petition, the ITA initiated a countervailing duty investigation, on March 28, 1983, to determine if Mexican PHC manufacturers, producers, or exporters received benefits that constituted bounties or grants. *Initiation of Countervailing Duty Investigation; Portland Hydraulic Cement and Cement Clinker From Mexico,* 48 Fed. Reg. 14019 (1983).

[1] Plaintiff-intervenor Cementos Anahuac del Golfo has filed a separate action with this Court, *Cementos Anahuac del Golfo, S.A. v. United States,* Court No. 86-01-00082, challenging the first 751 review of the original order.

At the time of the investigation Mexico was not a "country under the Agreement" within the meaning of section 701(b) of the Act, as amended, 19 U.S.C. § 1671 (1982), and therefore the ITA applied section 303 of the Act, as amended, 19 U.S.C. § 1303. Section 1303(a)(2) provides for the imposition of duties on nondutiable goods from a country which has no international obligation with the United States requiring an injury determination, by the U.S. International Trade Commission (ITC), for the merchandise. Therefore, under § 1303, the domestic industry was not required to allege, and the ITC was not required to determine, whether or not the importation of the Mexican merchandise caused or threatened to cause material injury to a United States industry.

The ITA determined the investigation was "extraordinarily complicated" and published, on May 19, 1983, its statement, pursuant to section 703(c)(1)(B)(i), of the Act, as amended, 19 U.S.C. § 1671b(c)(1)(B)(i) (1982), declaring the case extraordinarily complicated and requiring additional time necessary to make a preliminary determination. *Portland Hydraulic Cement and Cement Clinker From Mexico; Postponement of Preliminary Countervailing Duty Determination*, 48 Fed. Reg. 22606 (1983).

On July 1, 1983 the ITA completed and issued its preliminary determination that benefits constituting bounties or grants were being provided to Mexican cement businesses. *Preliminary Affirmative Countervailing Duty Determination; Portland Hydraulic Cement and Cement Clinker From Mexico*, 48 Fed. Reg. 31437 (1983). The scope of the investigation covered PHC merchandise which was currently imported under items 511.1420 and 511.1440 of the *Tariff Schedules of the United States Annotated* (TSUSA). The ITA preliminarily determined the estimated net subsidy provided by Mexico to the Mexican cement producers to be 5.69 percent *ad valorem. Id.* The ITA then directed Customs to "suspend liquidation of all entries of the products subject to this determination which are entered, or withdrawn from warehouse, for consumption, or to require a cash deposit or bond on these products in the amount equal to the estimated net subsidy." *Id.* at 31437.

The only known producers and exporters of the subject merchandise in Mexico, exported to the United States, were the following businesses: Cementos Guadalajara, S.A., (plaintiff), Cementos Anahuac del Golfo, S.A., (plaintiff-intervenor), Cementos de Chihuahua, S.A., Cementos Mexicanos, S.A., and Cooperative Cementos Hidalgo, S.C.L. *Final Affirmative Countervailing Duty Determination and Countervailing Duty Order: Portland Hydraulic Cement and Cement Clinker From Mexico*, 48 Fed. Reg. 43063 (1983).

On September 21, 1983, the ITA published its final results of the investigation on the cement merchandise from Mexico. *Id.* Based upon its investigation, the ITA determined certain benefits constituting bounties or grants, pursuant to 19 U.S.C. § 1303, were being provided to the Mexican producers and exporters of the subject

merchandise. The period of time used by the ITA, for measurement of the bounties or grants under investigation, was January 1 to December 31, 1982. *Id.* at 43064. The ITA continued to hold, in effect, the suspension of the liquidation ordered in the preliminary determination until further notice. *Id.* at 43070. The net bounties or grants for duty deposit purposes was established for each firm as follows: (1) Cementos Guadalajara, S.A., 5.13%; (2) Cementos Anahuac del Golfo, S.A., 1.64%; (3) Cementos de Chihuahua, S.A., 17.12%; (4) Cementos Mexicanos, S.A., 6.78%; (5) Cooperative Cementos Hidalgo, S.C.L., 0% and; (6) all other manufacturers, producers, or exporters, 6.05%. *Id.*

The ITA also continued to direct Customs to require cash deposits "in the amounts indicated above for each entry of the subject merchandise entered or withdrawn from warehouse, for consumption, on or after the date of the publication of the notice in the Federal Register, and to assess countervailing duties in accordance with sections 706(a)(1) [19 U.S.C. § 1671e(a)(1)] and 751 [19 U.S.C. § 1675] of the Act. *Id.* The ITA also stated its intention "to conduct an administrative review within 12 months of the publication of this determination * * *." *Id.*

It should be noted the ITA, in its final affirmative determination, repeated essentially the same statement made in its preliminary determination concerning Mexico's GATT status. This statement was published as follows:

> Mexico is not a "country under the Agreement" within the meaning of section 701(b) of the Act and, therefore, section 303 of the Act applies to this investigation. The merchandise being investigated is nondutiable, but there are no "international obligations" within the meaning of section 303(a)(2) of the Act which require an injury determination for nondutiable merchandise from Mexico. Therefore, under this section the domestic industry is not required to allege that, and the U.S. International Trade Commission is not required to determine whether, imports of this product cause or threaten material injury to a U.S. industry.

48 Fed. Reg. at 43064.

On April 30, 1985, the Office of the United States Trade Representative published notice that:

> The Government of the United Mexican States has assumed obligations with respect to the United States which are substantially equivalent to obligations under the Agreement on the Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade.
>
> In accordance with section 701(b) of the Tariff Act of 1930, as amended (19 U.S.C. 1671(b)), as of April 23, 1985, Mexico is a "country under the Agreement."

Determination Regarding the Application of Certain International Agreements, 50 Fed. Reg. 18335, 18335–36 (1985). This notice was

published in response to the action of the United States entering into a "substantially equivalent agreement" with Mexico entitled "Understanding between the United States and Mexico Regarding Subsidies and Countervailing Duties" (the Understanding). This bilateral agreement, signed on April 23, 1985, required, *inter alia,* the United States to find injury or threat of injury to a United States industry before imposing countervailing duties upon any product of Mexico. The agreement set forth, in pertinent part, as follows:

> With respect to all United States countervailing duty investigations in progress concerning products of Mexico as of the date of entry into force of this Understanding, the United States shall ensure that no countervailing duties shall be imposed upon any product of Mexico unless it is determined that the subsidized imports are, through the effects of the subsidy, causing or threatening to cause material injury to an established domestic industry, or retard materially the establishment of a domestic industry.

Understanding Between the United States and Mexico Regarding Subsidies and Countervailing Duties, (April 23, 1985) United States–Mexico, at paragraph 5.

On July 3, 1985, Commerce published the preliminary results of its first administrative 751 review of the outstanding CVD order on the subject cement items from Mexico. *Portland Hydraulic Cement and Cement Clinker From Mexico; Preliminary Results of Administrative Review of Countervailing Duty Order,* 50 Fed. Reg. 27476 (1985). The review covered the time period July 1, 1983 to December 31, 1983. The preliminary determination revealed the total bounty or grant extended to four firms, including one plaintiff, Cementos Guadalajara, and plaintiff-intervenor, Cementos Anahuac del Golfo, was found to be *de minimis* and the total bounty or grant extended to the remaining firms, including plaintiffs Cementos Portland Nacional and Cementos Veracruz, was found to be 3.49 percent *ad valorem. Id.* at 27479.[2]

On November 27, 1985, the ITA published notice it had received timely requests to conduct, among other things, a second 751 review of the CVD order on PHC from Mexico covering the period of January, 1984 to December, 1984. The ITA, pursuant to 19 C.F.R. §§ 353.53a(c) and 355.10(C), declared it would initiate this review. *Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 50 Fed. Reg. 48825 (1985).

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[2] In the notice, the ITA further stated:

> The Department intends to instruct the Customs Service to assess no countervailing duties on shipments of this merchandise from the four firms with a zero or *de minimis* rate of benefit, and countervailing duties of 3.49 percent of f.o.b. invoice price on shipments from all other firms entered, or withdrawn from warehouses, for consumption on or after July 8, 1983, the date of the Department's affirmative preliminary determination, and exported on or before December 31, 1983.
>
> The Department intends to instruct the Customs Service not to collect a cash deposit of estimated countervailing duties, as provided by section 751(a)(1) of the Tariff Act, on shipments from the four firms and to collect 3.15 percent of the entered value on shipments from all other firms entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review. These deposit requirements shall remain in effect until publication of the final results of the next administrative review.

50 Fed. Reg. at 27479.

The ITA published its final results on December 19, 1985 of its first 751 review of the CVD order, covering entries made from July 1, 1983 through December 31, 1983. *Portland Hydraulic Cement and Cement Clinker From Mexico; Final Results of Administrative Review of Countervailing Duty Order,* 50 Fed. Reg. 51732 (1985). The results of the first 751 review led the ITA to determine:

> The total bounty or grant during the period of review to be zero for Cementos Guadalajara, Cementos Mexicanos, Cementos Anahuac, and 0.40 percent *ad valorem,* for Cementos Hidalgo and 0.499 percent *ad valorem* for Cementos Veracruz. The Department considers any rate less than 0.50 percent to be *de minimis.* For all other firms, we determine the bounty or grant during the review period to be 3.50 percent *ad valorem.*

50 Fed. Reg. at 51737.[3]

The ITA gave interested parties opportunity to comment on the preliminary results of the first 751 review before publishing the notice of the final results. One of the interested party firms, not a party to the present action (Cementos de Chihuahua), contended in its comments the ITA should revoke the order pursuant to the provisions of section 303 of the Act, as amended, 19 U.S.C. § 1303. Section 1303 prohibits the ITA "from assessing countervailing duties on duty-free products without an affirmative finding of injury if the United States has an international obligation to provide such an injury test." *Id.* at 51736. Cementos de Chihuahua argued the Understanding, between the United States and Mexico granted Mexico most-favored-nation (MFN) status, and therefore it should be found Mexico and the United States had an international obligation that duty-free goods from Mexico would be afforded an injury test before countervailing duties would be assessed. Cementos de Chihuahua maintained the Understanding "requires an injury test in all then pending and subsequent investigations. It does not preclude injury tests for pre-existing countervailing duty orders." *Id.*

The ITA disagreed with these contentions. The ITA responded, in the published final results, there was:

> no international obligation within the meaning of section 303 of the Tariff Act to provide an injury test in this case. The Understanding specifically limits injury tests in countervailing duty proceedings to investigations in progress on April 23, 1985 and to proceedings begun on or after that date.
>
> With regard to paragraph 5, we have confirmed with the U.S. negotiators that their intention was to exclude application of

[3] The ITA continued to inform and direct Customs as to procedure on the shipments. The published notice provided:

> We will instruct the Customs Service to assess no countervailing duties on shipments of this merchandise from the five firms with zero or *de minimis* rates of subsidy, and countervailing duties of 3.50 percent of the f.o.b. invoice price on shipments from all other firms entered or withdrawn from warehouse, for consumption on or after July 8, 1983, and exported on or before December 31, 1983.
>
> The Department will instruct the Customs Service not to collect cash deposits of estimated countervailing duties, as provided by section 751(a)(1) of the Tariff Act, on shipments from the five firms with zero or *de minimis* assessment rates during the period of review or from Nacional and to collect cash deposits of estimated countervailing duties of 3.28 percent *ad valorem* for shipments from all other firms entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice. This deposit requirement and waiver shall remain in effect until publication of the final results of the next administrative review.

50 Fed. Reg. at 51737.

> this Understanding to pre-existing orders. Inasmuch as the Mexican government has not commented on our preliminary results (in which we proposed to assess duties) nor exercised its rights under the disputes clause of the Understanding (paragraph 11), we have no reason to believe that the Mexican government has a different view.

Id. at 51736.

On August 24, 1986, Mexico became a formal contracting party and acceded to the General Agreement on Tariffs and Trade (GATT).[4]

The ITA's preliminary results of the second 751 review of the CVD order were published on September 29, 1986. *Portland Hydraulic Cement and Cement Clinker From Mexico; Preliminary Results of Countervailing Duty Administrative Review*, 51 Fed. Reg. 34483 (1986). The review covered the period January 1, 1984 through December 31, 1984. As a result of its review, the ITA preliminarily determined *de minimis* bounty or grant rates existed for three Mexican firms, including plaintiff-intervenor, and a bounty or grant rate of 3.35 percent *ad valorem* existed for all other firms, including all other plaintiffs. The ITA stated its intention to instruct Customs on the assessment of duty cash deposits.[5]

On October 22, 1986, plaintiff-intervenor requested the ITA to take action to revoke the outstanding CVD order, contending the order was not in accordance with U.S. international obligations with Mexico under the GATT.

The ITA completed its second 751 review and published the results on December 10, 1986. *Portland Hydraulic Cement and Cement Clinker From Mexico; Final Results of Countervailing Duty Administrative Review*, 51 Fed. Reg. 44500 (1986). In Comment 1 of these results, the ITA commented about its authority to revoke the original CVD order, as was requested by the petitioners. The following is the ITA's published comments on this contention:

> *Comment 1:* The five exporters contends [sic] that the Department should revoke this order. Section 303 of the Tariff Act prohibits the Department from assessing countervailing duties on duty-free products without an affirmative finding of injury if the United States has an international obligation to provide such an injury test. In the "Understanding Between the United States and Mexico Regarding Subsidies and Countervailing Duties" ("the Understanding") signed on April 23, 1985, the Unit-

[4] General Agreement on Tariffs and Trade (GATT), 30 October 1947, 61 Stat., T.I.A.S. No. 1700, 55 U.N.T.S. 184 (1947).

[5] The notice set forth:

> The Department intends to instruct the Customs Service not to assess countervailing duties on shipments of Mexican portland hydraulic cement and cement clinker from the three firms with zero or *de minimis* benefits, and to assess countervailing duties of 3.35 percent of the f.o.b. invoice price on shipments from all other firms exported on or after January 1, 1984 and on or before December 31, 1984.
>
> The increase in the FOMEX interest rates reduces the total estimated bounty or grant to 3.20 percent *ad valorem*. Therefore, the Department intends to instruct the Customs Service not to collect a cash deposit of estimated countervailing duties, as provided by section 751(a)(1) of the Tariff Act, on shipments from Cementos Anahuac, S.A., Cementos Maya, S.A., and Cementos Mexicanos, S.A., and to collect 3.20 percent of the f.o.b. invoice price on shipments from all other firms entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review. These deposit requirements and waiver shall remain in effect until publication of the final results of the next administrative review.

51 Fed. Reg. at 34486.

> ed States granted Mexico most-favored-nation ("MFN") status. On August 24, 1986, Mexico acceded to the General Agreement on Tariffs and Trade ("GATT"). Both the MFN status and GATT membership constitute international obligations of the United States, as defined in section 303. The Department cannot continue to impose countervailing duties on Mexican exports of duty-free products without an affirmative injury determination, which is required by both Article VI.6.(a) of the GATT and section 303 of the Tariff Act.
>
> *Department's Position:* We believe that we lack the authority to revoke this countervailing duty order on the basis of the Understanding. We confirmed with the principal U.S. negotiators that the intent of Article 5 of the Understanding was to exclude from the application of the Understanding, and hence the application of "country under the Agreement" status, [sic] order existing before April 23, 1985. *See,* final results of countervailing duty administrative review on certain iron-metal construction castings from Mexico (51 FR 9698, March 20, 1986).
>
> We are currently considering whether Mexico's accession to the GATT affects our authority to assess countervailing duties on Mexican duty-free products without an affirmative injury determination from the International Trade Commission. Since Mexico's accession was effective on August 24, 1986, our decision will not affect entries covered by this review, which extends only through December 31, 1984.

51 Fed. Reg. at 44500–1.

In similarity to the preliminary determination, the final published results of the second 751 review set forth that the ITA determined a zero or *de minimis* bounty or grant rate existed on goods exported from Mexico, during the January 1, 1984 through December 31, 1984 time period, for Cementos Maya, Cementos Mexicanos, and plaintiff-intervenor. The ITA also determined a 3.32 percent *ad valorem* rate existed for all other firms, including plaintiffs. The ITA directed Customs to continue to 'assess no countervailing duties on shipments of this merchandise from the three firms with zero or *de minimis* rates and to assess countervailing duties of 3.32 percent of the f.o.b. invoice price shipments from all [the] other firms * * *."

On December 12, 1986, plaintiffs filed this action challenging the final second 751 review results published on December 10, 1986 and raising their arguments concerning an injury determination and revocation of the original countervailing duty order.

On November 6, 1987, upon consent of all parties, the Court enjoined Customs and the ITA from directing the liquidation of the entries of PHC exported from Mexico during the year 1984, the time period covered by the final second 751 review results as published in the Federal Register on December 10, 1986, 51 Fed. Reg. 44500.

BACKGROUND

Since much of plaintiffs' claims rest on the application of the U.S. countervailing duty law acting in concert with U.S. international trade agreements, it is instructive to consider the relevant statutes and their historical development in relation to United States trade treaties.

The countervailing duty law of the United States has its statutory roots established in the provisions of the Tariff Act of 1890, which, *inter alia*, provided for domestic sugar refiners' protection from unfair foreign competition. This protection consisted of countervailing duties imposed on refined sugar imported from countries that directly or indirectly paid bounties on refined sugar. Tariff Act of 1890, Ch. 1244, ¶237, 26 Stat. 567, 584 (1890).[6]

It was section 5 of the Tariff Act of 1897, though, that applied the countervailing duty law to all imported products.[7] This provision was reenacted over the years by Congress without substantial change. *See* Tariff Act of 1909, § 6, 36 Stat. 85; Tariff Act of 1913, § IV(E), 38 Stat. 193; Tariff Act of 1922, § 303, 42 Stat. 935; Tariff Act of 1930, § 303, 46 Stat. 687; Trade Act of 1974, § 331(a), 88 Stat. 2049, 19 U.S.C. § 1303.

Running parallel to and interacting with the development of the U.S. countervailing duty law is the General Agreement on Tariffs and Trade, otherwise knows as the GATT.[8] The GATT is an international treaty that was entered into, on October 30, 1947, by twenty-three governments, including the United States, involved in tariff negotiations after the close of World War II. The United States, and other countries that acceded to the GATT, apply this agreement under the Protocol of Provisional Application, 55 U.N.T.S. 308 (1947). This protocol stated that certain signing countries, including the United States, would undertake to apply provisionally (on or after January 1, 1948) the following: "(a) Parts I and III of the [GATT], and (b) Part II of that Agreement to the fullest extent not inconsistent with existing legislation." *Id.* Clause (b) has been commonly known as the "grandfather clause" because it allows the United States, as well as ohter countries, to retain, in force *inter alia*, any pre-existing countervailing duty laws and legislation that were inconsistent with GATT. This is significant to note especially for reference in the discussion below of the Trade Act of 1974, and subsequent trade acts.

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[6] The coverage of these provisions was expanded in 1894 to cover all imported sugar, new and refined. Tariff Act of 1894, ch. 349, ¶182 1/2, 28 Stat. 509, 521 (1894).

[7] Section 5 provides as follows:

> That whenever any country, dependency, or colony shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise from such country, dependency, or colony, and such article or merchandise is dutiable under the provisions of this Act, then upon the importation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this Act, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The net amount of all such bounties or grants shall be from time to time ascertained, determined, and declared by the Secretary of the Treasury, who shall make all needful regulations for the identification of such articles and merchandise and for the assessment and collection of such additional duties.

Tariff Act of 1897, ch. 11, § 5, 30 Stat. 151, 205 (1897).

[8] General Agreement on Tariffs and Trade, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 182.

Part II of the GATT includes Article VI which deals with the area of antidumping and countervailing duties. Paragraph 6(a) of Article VI provides:

> 6. (a) No contracting party shall levy any antidumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.

GATT, 61 Stat. All, T.I.A.S. No. 1700, 55 U.N.T.S. 184 (1947).[9]

At the time of the establishment of the GATT in 1947, the United States countervailing duty law, under § 303 of the Tariff Act of 1930, only applied to dutiable items and did not provide for an injury determination. Therefore, under the "grandfather clause" of the GATT, the United States was under no obligation to apply paragraph 6(a) of the GATT, which was inconsistent with U.S. trade law.

In 1974, Congress passed the Trade Act of 1974, which, *inter alia*, amended § 303 of the trade laws, expanding the countervailing duty law to cover non-dutiable as well as dutiable items.[10] Section 303 originally contained the old law that allowed countervailing duties to be assessed on only dutiable items. The 1974 amendment added, *inter alia*, subsection (a)(2) which provided as follows:

> (2) In the case of any imported article or merchandise which is free of duty, duties may be imposed under this section only if there is an affirmative determination by the Commission under subsection (b)(1) of this section; except that such a determination shall not be required unless a determination of injury is required by the international obligations of the United States.

19 U.S.C. § 1303(a)(2) (1976).

The legislative history explains the reasons behind these amendments:

> 4. *Injury Test—Duty-Free Merchandise.*—The Committee agreed with the provision of the House bill extending the application of the countervailing duty law to duty-free articles. Under this provision, no additional duty could be imposed with respect to any duty-free article unless there is a determination by the International Trade Commission * * * that a domestic producer of like or directly competitive articles is being or is likely to be injured, or is prevented from being established by reason of importation of such article.

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[9] As amended and restated by Part D of the Protocol Amending the Preamble and Parts II and III of GATT. 8 UST 1769 (Oct. 7, 1957).

[10] The following amendments were made to § 303 of the Tariff Act of 1930:

> [For] Subsec[tion] (a), [the Trade Act of 1974] designated existing provisions as par. (1), added pars. (2) to (6), and in par. (1) as so designated, struck out "and such article or merchandise is dutiable under the provisions of this chapter," preceding "then upon the importation of any such article or merchandise" and struck out provisions directing the Secretary of the Treasury to ascertain, determine, or estimate, from time to time, the net amount of bounties or grants, declare the net amount so determined or estimated, and make all regulations he deems necessary for the identification of the articles and merchandise and for the assessment and collection of the additional duties.
> [For] subsec[tion] (b) to (e) [, the Trade Act] added subsecs. (b) to (e).

The Trade Act of 1974, § 331(a), 19 U.S.C. § 1303, note on amendments (1976).

> The inclusion of an injury standard is appropriate in light of the general countervailing duty rule in Article VI of the GATT which requires a finding of injury before such duties may be levied on subsidized product imports. Section 303 of the 1930 Tariff Act does not provide for an injury test. However, because the present U.S. countervailing duty law, which only applies to dutiable items, predates the GATT, it is within the permitted exceptions to the GATT under the so-called "grandfather clause." However, the extension of such law to nondutiable items is not covered by any such exception and so the nondutiable items should be subject to an injury test.

S. Rep. No. 1298, 93 Cong., 2d Sess. 185, *reprinted in* 1974 U.S. Code Cong. & Admin. News 7186, 7320.

Therefore, following the enactment of the Trade Act of 1974, injury determinations by the International Trade Commission (ITC) were required as condition precedent to imposing countervailing duties on subsidized nondutiable goods only if required by international obligations (*i.e.*, the GATT). An injury test was still not required for dutiable goods.

In 1979, Congress enacted the Trade Agreements Act of 1979, Pub. L. 96–39, 93 Stat. 144, which added a new title to the Tariff Act of 1930, Title VII: Countervailing and Antidumping Duties, 19 U.S.C. §§ 1671 through 1677g. The Trade Agreements Act was the implementing legislation for the Subsidies/Countervailing Measures Agreement (Subsidies Code), signed by GATT members, stemming from the Tokyo Round of trade negotiations of the GATT.[11] Section 101 of the Trade Agreements Act added § 701 to the Tariff Act of 1930, 19 U.S.C. § 1671, which replaced the countervailing duty law under 19 U.S.C. § 1303, as applied to exports from a "country under the Agreement." The term "under the Agreement" refers to the obligations found in the Subsidies Code of the GATT. Section 1671 provides as follows:

§ 1671. Countervailing duties imposed.

(a) General Rule

If—

(1) the administering authority determines that—

(A) a country under the Agreement, or

(B) a person who is a citizen or national of such a country, or a corporation, association, or other organization organized in such a country,

is providing, directly or indirectly, a subsidy with respect to the manufacture, production, or exportation of a class or kind of merchandise imported into the United States, and

(2) the Commission determines that—

(A) an industry in the United States—

(i) is materially injured, or

[11] The Tokyo Round of Multinational Trade Negotiations was conducted form 1973 through to 1979.

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded,

by reason of imports of that merchandise,

then there shall be imposed upon such merchandise a countervailing duty, in addition to any other duty imposed, equal to the amount of the net subsidy.

(b) Country under the Agreement

For purposes of this part, the term "country under the Agreement" means a country—

(1) between the United States and which the Agreement on Subsidies and Countervailing Measures applies, as determined under section 2503(b) of this title.

(2) which has assumed obligations with respect to the United States which are substantially equivalent to obligations under the Agreement, as determined by the President, or

(3) with respect to which the President determines that—

(A) there is an agreement in effect between the United States and that country which—

(i) was in force on June 19, 1979, and

(ii) requires unconditional most-favored-nation treatment with respect to articles imported into the United States,

(B) the General Agreement on Tariffs and Trade does not apply between the United States and that country, and

(C) the agreement described in subparagraph (A) does not expressly permit—

(i) actions required or permitted by the General Agreement on Tariffs and Trade, or required by the Congress, or

(ii) non-discriminatory prohibitions or restrictions on importation which are designed to prevent deceptive or unfair practices.

(c) Cross reference

For provisions of law applicable in the case of merchandise which is the product of a country other than a country under the Agreement, see section 1303 of this title.

19 U.S.C. § 1671 (1982).

The legislative history explains the "new" law and its effect on the "old" countervailing duty law:

Present law.—

* * * * * * *

Section 303 generally does not require that imports benefiting from a bountry or grant injure a domestic industry before a countervailing duty is imposed. However, if the international obligations of the United States require that duty-free articles from a particular country injure a domestic industry before a countervailing duty may be imposed, then section 303(a)(2) requires a determination whether a domestic industry is being or is likely to be injured, or is prevented from being established, by reason of the importation of the article or merchandise benefiting from the bounty or grant.

* * * * * * *

The bill.—The bill would leave section 303(a)(1) and (2) of the Tariff Act in effect. Section 303 would apply to all imports other than those to which new section 701 of the Tariff Act of 1930 * * * applies * * *.

Under section 701 of the Tariff Act * * *, a countervailing duty would be imposed on a class or kind of merchandise imported into the United States if—

> (1) a country to which the United States accords the benefits of the Agreement on Subsidies and Countervailing Measures, or
> (2) a person, who is a citizen or national of such a country, or an organization organized in such a country,

is providing, directly or indirectly, a subsidy with respect to the manufacture, production, or exportation of that merchandise. No countervailing duty could be imposed under section 701 unless a domestic industry is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of the class or kind of merchandise with respect to which a subsidy is being provided.

* * * * * * *

Reason for the provision.—Section 701 would establish the conditions for imposition of countervailing duties consistent with the agreement. A domestic industry must be materially injured by reason of subsidized imports before a countervailing duty could be imposed.

Section 701 would apply only to the extent (1) required by the agreement, as determined under section 2(b) of the bill, and (2) provided under section 701(b)(2) and (3). In all other cases, section 303 of the Tariff Act of 1930, as amended under section 103 of the bill, would continue to apply. Section 303 would continue to require injury as a condition for imposition of countervailing duties only on duty-free imports and only if the international obligations of the United States so require.

Selective application of section 701 is intended to encourage countries to assume the obligations of the agreement, or substantially equivalent obligations, with respect to the United States. This application is consistent with the agreement and the GATT, including the Protocol of Provisional Application of the General Agreement on Tariffs and Trade.

* * * * * * *

> *Present law.*—Section 303 of the Tariff Act (19 U.S.C. 1303) contains few procedural provisions * * *. The ITC injury determination is required * * * only with respect to duty-free goods and only to the extent required by the international obligations of the United States. The United States is obligated to apply the injury test under section 303 only with respect to duty-free products of countries which have fully acceded to the General Agreement on Tariffs and Trade.
>
> *The bill.* The amendment * * * would exclude from the coverage of section 303 of the Tariff Act articles which are the product of a country under the agreement within the meaning of section 701(b) of the Tariff Act, *i.e.*, articles to which section 701 of the Tariff Act would apply.
>
> * * * * * * *
>
> *Reasons for the provision.*—The amendments * * * conform section 303 * * * to appropriate provisions of title VII of the Tariff Act * * *. Section 303(a)(1) and (2) of the Tariff Act will continue in effect with respect to articles not subject to section 701 of that act. Section 303 will continue to impose countervailing duties, without an injury determination, on all dutiable and certain duty-free articles with respect to which bounties or grants are being provided. The President's statement of proposed administrative action erroneously asserts that an injury determination will be required before countervailing duties can be imposed on duty-free articles from any country. Duty-free articles from certain countries will be subject to countervailing duties after an injury determination, but only if international obligations of the United States, other than the Agreement on Subsidies and Countervailing Measures, require that determination with respect to products of those countries.

S. Rep. No. 96–249, 96th Cong., 1st Sess, 43–45 and 103, *reprinted in* U.S. Code Cong. & Admin. News 381, 429–431 (footnote omitted).

Section 1303 was amended by the Trade Agreements Act of 1979 by changing the language in (a)(2) and adding new language in (b). These changes are shown as follows:[12]

> (2) In the case of any imported article or merchandise which is free of duty, duties may be imposed under this section only if there are affirmative determinations by the Commission under subtitle IV of this chapter except that such a determination shall not be required unless a determination of injury is required by the international obligations of the United States.
>
> (b) Regulations prescribed by administering authority; imported articles or merchandise which are not duty free

[12] The amended changes are explained as follows:

Subsec. (a)(2). Pub. L. 96–39, § 103(c), substituted "are affirmative determinations by the Commission under subtitle IV of this chapter" for "is an affirmative determination by the Commission under subsection (b)(1) of this section".

Subsec. (a)(3) to (6). Pub. L. 96–39, § 103(b)(1), struck out pars. (3) to (6) which related to imported articles or merchandise as to which the Secretary of the Treasury had not determined whether or not any bounty or grant was being paid or bestowed, the determination of the question of bounty or grant, and the Secretary's authority to promulgate necessary regulations for the identification of articles and merchandise subject to duties under this section and for the assessment and collection of those duties.

Subsec. (b). Pub. L. 96–39, § 103(b)(2), substituted provisions relating to the imposition of countervailing duties, the regulations relating to the imposition of those duties, and exceptions in the case of imported articles or merchandise which are not free of duty for provisions relating to the determination of injury with respect to duty-free merchandise and the suspension of liquidation.

Trade Agreements Act § 103, 19 U.S.C. § 1303 note on amendments (1982).

The duty imposed under subsection (a) of this section shall be imposed, under regulations prescribed by the administering authority (as defined in section 1677(1) of this title), in accordance with subtitle IV of this chapter (relating to the imposition of countervailing duties) except that, in the case of any imported article or merchandise which is not free of duty—

(1) no determination by the United States International Trade Commission under section 1671b(a), 1671c, or 1671d(b) of this title shall be required,

(2) an investigation may not be suspended under section 1671c(c) of this title,

(3) no determination as to the presence of critical circumstances shall be made under section 1671b(e) or 1671d(a)(2) or (b)(4)(A) of this title, and

(4) any reference to determinations by the Commission, or to the suspension of an investigation under section 1671(c) of this title.

19 U.S.C. § 1303(a)(2) and (b) (1982).

It appears, from the language of the statute and from the legislative history that § 701 of the Tariff Act of 1930 as amended by the Trade Agreements Act of 1979 § 101, 19 U.S.C. § 1671 became the controlling countervailing duty law for countries under the Agreement and § 303, 19 U.S.C. 1303, became applicable as a residual provision covering situations that did not apply under § 701, *i.e.,* situations involving countries not under the Agreement.

The Trade Agreements Act of 1979, in part, amended the U.S. trade laws to include, *inter alia,* an injury test for dutiable goods imported from a country under the GATT or from a country the U.S. recognizes as one that has assumed obligations substantially equivalent to those found in the GATT. Dutiable goods not covered under Title VII of the 1979 Act were still subject to countervailing duties without an injury determination. It appears from the language, therefore, dutiable and nondutiable merchandise subject to bounties or grants from countries or entities not "under the Agreement" and not under certain international obligations with the United States are subject to countervailing duty imposition without an injury determination.

Discussion

The gravamen of plaintiffs' argument is "that the [ITA] acted contrary to law in imposing countervailing duties on imports of PHC from Mexico in *Portland Hydraulic Cement and Cement Clinker From Mexico; Final results of Countervailing duty Administrative Review,* 51 Fed. Reg. 44501 (* * * 1986)." Plaintiffs' Reply to Defendant's Opposition to Plaintiffs' Motion for Summary Judgment at 2, *Cementos Guadalajara, S.A. v. United States,* Court No. 86–12–01525.

Plaintiffs' first arm of their argument specifically challenges the ITA's issuance of a CVD order imposing duties on the subject nondutiable imports without an affirmative injury determination by the ITC. Plaintiffs do not dispute Section 303 of the Tariff Act of 1930, 19 U.S.C. § 1303 governs the ITA's determination to impose countervailing duties on the subject merchandise, *see,* Plaintiffs' Memorandum in Support of Motion for Summary Judgment at 10, *Cementos Guadalajara, S.A.*, Court No. 86-12-01525,[13] but contend the ITA has misinterpreted the language of § 1303(a)(2), "international obligations" and has erroneously misapplied the statute by not requiring an injury determination by the ITC for the nondutiable merchandise from Mexico. Plaintiffs urge § 1303(a)(2) "mandate an injury test in all such instances [, as here]" because the "international obligations" so require. *Id.* at 11.

Defendant challenges the Court's jurisdiction to review this first argument, as well as other subordinate arguments, because plaintiffs should have raised this challenge within thirty days after publication of the CVD order, pursuant to 19 U.S.C. § 1516a. Amici curiae supports this position.

Section 1516a(a)(2)(A) states:

(2) Review of determinations on record

(A) In general.—Within thirty days after—

(i) the date of publication in the Federal Register of—

(I) notice of any determination described in clause (ii), (iii), (iv), or (v) of subparagraph (B), or

(II) an antidumping or countervailing duty order based upon any determination described in clause (i) of subparagraph (B), or

(ii) the data of mailing of a determination described in clause (vi) of subparagraph (B),

an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing a summons, and within thirty days thereafter a complaint, each with the content and in the form, manner, and style prescribed by the rules of that court, contesting any factual findings or legal conclusions upon which the determination is based.

19 U.S.C. § 1516a(a)(2)(A) (1982).

Defendant contends "[i]n such a civil action, [plaintiffs] may contest any factual finding or legal conclusion upon which the determination is based, and judicial review is limited to determining whether the determination, finding, or conclusion is supported by substantial evidence on the record, or otherwise not in accordance with

[13] It appears the issue of whether 19 U.S.C. § 1303 or 19 U.S.C. § 1671 should apply in situations such as the case at bar is presently under consideration by the Court in *Cementos Anahuac del Golfo, S.A. v. United States*, Court No. 86-12-01607.

law." Defendant's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment at 17. Defendant contends plaintiffs should have raised their challenge to the underlying CVD order thirty days after the publication of that determination, rather than waiting over three years and two 751 reviews later; an overly lengthy hiatus that bars plaintiffs from now raising the argument. Defendant concludes the Court has jurisdiction only concerning "the factual findings and legal conclusions which underlie Commerce's determination of the amounts of the countervailing duties which are to be assessed upon entries of PHC from Mexico which are covered by the administrative review for the period January 1, 1984 through December 31, 1984 and which could not have been raised in a civil action instituted in October of 1983." *Id.* at 21.

The Court agrees it does not have jurisdiction to review certain arguments by plaintiffs that fall under section 516A(a)(2)(A)(1)(II), 19 U.S.C. § 1516a(a)(2)(A)(i)(II), which concern plaintiffs' charging the ITA with failure to request and require an injury determination before issuing its underlying countervailing duty order, pursuant to 19 U.S.C. § 1303(a)(2). If plaintiffs believe the underlying CVD order void because of the lack of an injury determination, they should have raised this contention within thirty days after September 21, 1985, when the ITA published its determination that an injury determination was not necessary. It is proper to challenge the ITA's determination within the statutory timeframe prescribed by Congress and within the statutory timeframe which allows the ITA to determine whether it is necessary to require filing of a petition seeking an injury determination from the ITC if it determines it is proper or upon remand from the Court.

Plaintiffs have waited until the statutory framework precludes the ITC from conducting an injury investigation. *See,* 19 U.S.C. § 1671a(b)(2). They now raise an argument complaining about the lack of such procedure upon grounds they claim have been in existence since 1974, nine years prior to the date of the CVD order. Clearly plaintiffs' own inertia in filing their action and raising these arguments within thirty days after the publication of the CVD order has precluded them from raising this contention now and from this Court having jurisdiction to review the matter. *See Royal Business Machines, Inc.* v. *United States,* 669 F.2d 692 (CCPA 1982).[14]

Plaintiffs' second arm of its "§ 303 injury determination requirement" argument urges, in the alternative, that Mexico's accession to GATT entitles the PHC merchandise to an injury determination in all countervailing duty proceedings. Plaintiffs state:

> [s]ince the date of the Agreement in 1985 Mexico assumed "substantially equivalent obligations" to those specified under Article VI of the GATT, and since the date of Mexico's GATT acces-

[14] The Court points out, nevertheless, where an original CVD investigation is void, for example, where fraud is involved, a petitioner should be able to raise its challenge, *ab initio,* to the original determination, as part of an action challenging the results of a 751 review.

> sion in 1986, Mexico has become entitled to all the privileges of GATT membership. This, of course, includes the privilege that its products not be subject to the imposition of countervailing duties where there has been no related injury determination by ITC. Section 303(a)(2).[15]

Plaintiffs' Memorandum for Summary Judgment at 33. This, plaintiffs argue, is an alternative "reason why the final results of the annual review do not provide a legal basis for ITA to direct Customs to liquidate past entries or require the deposit of estimated countervailing duties on current entries." *Id.*

Plaintiffs additionally contend:

> [a]fter GATT accession or other qualifying action, ITA is without authority to issue any order directing the Customs to *impose* final countervailing duties and liquidate entries absent an affirmative injury requirement. The fact that the entries in question were made prior to GATT accession is not dispositive; the fact the order directing imposition or final liquidation of provisional duties collected on those entries was issued *after* GATT accession is.
>
> The term "imposed", as used in Section 303(a)(2) of the Act and defined by the legislative history, has the same meaning as the term "levy" as used in the GATT and defined in the GATT Subsidies Code. Therefore, any ITA order directing the U.S. Customs Service to assess final countervailing duties and to liquidate entries on otherwise duty-free products from a GATT Contracting Party is, regardless of when the goods were actually entered, contrary to U.S. law, absent an affirmative injury determination.

Plaintiffs' Memorandum in Support of Summary Judgment, at 46–47.

Plaintiffs conclude the only appropriate remedy, in this situation, is revocation of the outstanding CVD order. Plaintiffs' support for this argument comes from an ITA published final countervailing duty 751 review results, *Final Results and Partial Revocation of Certain Fasteners From India,* 47 Fed. Reg. 44129 (1982), and an ITA published preliminary CVD determination, *Carbon Steel Wire Rod from Trinidad and Tobago,* 50 Fed. Reg. 19561 (1985). These cases involved situations where the ITA determined (preliminarily in the Trinidad case) to revoke CVD orders covering products from current GATT member countries, entered before and after the decision by the United States Government to change the status of those products from dutiable to nondutiable status. The CVD order was maintained in effect, however, for those fasteners imported prior to the status change in *Indian Fasteners,* but was revoked for goods entered after the status change.[16]

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[15] Plaintiffs have stated earlier the issue of the applicability of the 1985 Understanding to the PHC case is not at issue in plaintiffs' appeal. Therefore, the court will not address this argument. *See* Plaintiffs' Memorandum for Summary Judgment at 10.

[16] The ITA has yet to issue a final revocation order in its investigation *Carbon Steel Wire From Trinidad.*

Defendant opposes these contentions and claims plaintiffs have challenged the final second 751 review results covering the time period of January 1, 1984 through December 31, 1984, a time period existing completely before Mexico's date of accession to the GATT. Defendant continues: "Neither Section 303(a)(2) nor the GATT requires the United States to refrain from imposing countervailing duties on merchandise which was entered at a time when no international obligations of the United States required the merchandise be granted an injury test * * *." Defendant's Memorandum in Opposition to Summary Judgment at 53–54.

Defendant disputes the notion Congress provided for a retroactive application of the countervailing duty law to the subject merchandise entered prior to Mexico's accession to the GATT. Defendant explains, in this instance, although estimated duties are paid upon entry and the actual duties are collected after the 751 review results assess the amount, the liability for whatever duties are collected is established at the time of entry. It is recognized, defendant continues, duties are suspended until a 751 review assesses the correct amount.

Additionally, defendant argues the two published ITA determinations plaintiffs cite for support are distinguishable in the facts from the case at bar. Defendant points out in both of the cited cases, the subject merchandise came from countries already maintaining GATT membership or maintaining status as a "country under the Agreement." Defendant also points out the merchandise was duty-free upon entry. The instant case involves goods from a nation with no existing status as a member nation of GATT or as having no pre-existing rights to a different determination with goods changing status in the middle of a 751 review.

Defendant concludes the actual assessment and liquidation of duties on the subject PHC merchandise is based upon the corresponding 751 review results covering the certain time periods at issue occurring before Mexico's GATT accession and therefore not subject to an injury determination.

Section 303, the applicable statute in this action, provides, in pertinent part

(a) Levy of countervailing duties

> (1) Except in the case of * * * merchandise * * * of a country under the Agreement * * * whenever any country * * * pay[s] or bestow[s] * * * any bounty or grant upon the manufacture * * * of any * * * merchandise manufactured in such country * * * then *upon the importation* of such * * * merchandise into the United States * * * there shall be *levied and paid* * * * *in addition to any duties otherwise imposed,* a duty equal to the * * * bounty or grant * * *.
>
> (2) In the case of any imported * * * merchandise which is free of duty, duties may be *imposed* under this section only if there are affirmative [injury] determinations by the [ITC] under subtitle IV of this chapter; except that such a determination

> shall not be required unless a determination of injury is required by the international obligations of the United States.

19 U.S.C. § 1303(a)(1)–(2) (1982) (emphasis added). Subsection (b) directs that the duties imposed under subsection (a) "be imposed, under regulations prescribed by the administering authority (as defined in section 1677(i) of this title), in accordance with subtitle IV of this chapter * * *" and discusses exceptions with respect to dutiable merchandise. § 1303(b) (1982).

Plaintiffs argue the language of § 1303(a)(2), has the clear meaning that the final liquidation and imposition of assessed duties, and not merely the collection of estimated duties, may not occur, until an affirmative injury determination has been issued. Plaintiffs maintain the ITA directing Customs to impose final duties, after Mexico's accession to the GATT, was an action in direct contravention of § 1303(a)(2).

In support of this proposition plaintiffs argue Congress, in the legislative history, made evident its intent to conform § 331(a) (1303(a)) to Article VI of the GATT Agreement setting forth "[n]o contracting party shall *levy* any" CVD order without an injury determination. Plaintiffs contend that Congress intended the word "imposed" in § 303(a)(2) to have the same legal meaning as the term "levy" in GATT Article VI;[17] *i.e.*, the final assessment and imposition of duties. Plaintiffs point out the ITA has also undertaken the same analysis and arrived at the same definition as published in *Certain Fasteners From India; Final Results of Administrative Review and Partial Revocation of Countervailing Duty Order*, 47 Fed. Reg. 44129, 44130 (1986).[18]

Plaintiffs arguments appear, on their face, convincing, but in reality misconstrue the clear and logical reading of the statute itself. The Court recognizes:

> The starting point for interpreting a statute is the language of the statute itself, which must ordinarily be regarded as conclusive absent a clearly expressed legislative intention to the contrary. *Consumer Product Safety Comm'n* v. *GTE Sylvania*, 447 U.S. 102, 108 (1980) * * *; *Southeastern Community College* v. *Davis*, 442 U.S. 397, 405 (1979) * * *; *Gilmore Steel Corp.* v.

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[17] It appears the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of GATT, GATT Subsidies Code article 4, paragraph 2, footnote 14 defines "levy" as the definitive or final legal assessment or collection of duty or tax.

[18] The ITA published the following language in its determination:

> Section 303(a)(2) of the Tariff Act states:
>
> * * * * * * *
>
> To understand what Congress intended the word "imposed" to mean, we must look to the legislative history of Section 331 of the Trade Act of 1974, Senate Report 93-1298, 93rd Cong., 2d Sess. At 185 * * *.
>
> * * * * * * *
>
> This language makes clear that Congress intended section 331(a) to conform to the Article VI GATT injury requirement. Paragraph 6 of Article VI of the GATT states that:
>
> > No contracting party shall *levy* any * * * countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the * * * subsidization * * * is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry. (emphasis added)
>
> Thus, it is apparent that, in this context, Congress intended "impose" to mean "levy." The GATT does not define "levy"; however, the Agreement on Interpretation and Application of Articles VI, XVI and XXIII if the GATT ("Subsidies Code") defines "levy" to mean "the definitive or final legal assessment or collection of a duty or tax." Accordingly, the injury requirement extends beyond the issuance of the countervailing duty order throughout the life of an order whenever duties are assessed or collected. (We also note that, while not dispositive, the title of section 303 itself is "*Levy* of Countervailing Duties". (emphasis added)

Certain Fasteners from India: Final Results, 47 Fed. Reg. at 44130.

> *United States,* 11 CIT ——, Slip Op. 87-112 at 9 (Oct. 6, 1987). Going behind a statute's plain language to search for a possibly contrary congressional intent is a step the court must take cautiously, even under the best circumstances. *United States* v. *Locke,* 471 U.S. 84, 95-96 (1985).

Serampore Industries PVT. LTD. v. *United States,* —— CIT ——, ——, 675 F. Supp. 1354, 1358 (1987) (some citations omitted).

Section 1303(a)(2) states, in the case of duty free merchandise: "duties may be imposed under this Section * * *." This refers to all of § 1303. It must be remembered subsection (a) paragraph (2) was added as an amended portion to § 1303 in 1974, providing for an injury test on duty-free merchandise. It did not supersede the rest of § 1303 but became an integral part of the statute to be read in tandem.

In the search for how duties are "imposed under this section", Subsection (a) paragraph (1) states "*then upon the importation* of such * * * merchandise into the United States * * * there shall be levied and paid * * *." The point of reference for the requirement of an injury determination before imposition of countervailing duties appears to correspond to the time when the goods are entered or imported into the United States, not when duties are finally assessed after a 751 review. Once the mechanics of "imposition of duties" is understood, then the phrase "duties may be imposed under this section only if there are affirmative determinations by the [ITC]" becomes clear. Here, *when* the goods were imported more specifically addresses the application of Mexico's GATT accession to the entitlement to an injury determination under § 1303(a)(2), than does the argument about whether 'impose' refers to duty deposits or 751 review assessments.

Goods entered prior to Mexico's accession to GATT are subject to the corresponding outstanding CVD order and final 751 review assessments covering the time period of their entry because upon importation these goods were subject to countervailing duties as goods from a country not under the Agreement and not privileged to an injury determination as set out in the statute. See § 1303(a)(1). Duties to be assessed are those duties incurred on goods covered by the specific 751 review time periods. *Ambassador Division of Florsheim Shoe* v. *United States,* 748 F.2d 1560, 1565 (Fed. Cir. 1984).

That the liability for duties is established at the time of the entry of the goods into the United States has been recognized as an axiom of countervailing duty law. This Court in *Zenith Radio Corp.* v. *United States,* recognized:

> [A] claim by the United States for the appropriate duties arises upon the entry of a shipment of merchandise into the customs territory of the United States * * *.
>
> It is true that the amount of the claim for duties may be uncertain until liquidation occurs. Nevertheless, the claim for du-

ties exists and an importer obtains possession of goods which he imports subject to the claim of the United States.

Zenith Radio Corp. v. *United States,* 1 CIT 180, 184, 509 F. Supp. 1282, 1286 (1981); *rev'd and rem'd on other grounds, Zenith Radio Corp.* v. *United States,* 710 F.2d 806 (Fed. Cir. 1983); *rev'd and rem'd on other grounds, Zenith Radio Corp.* v. *United States,* 764 F.2d 1577 (Fed. Cir. 1985); *aff'd on other grounds, Zenith Radio Corp.* v. *United States,* 823 F.2d 518 (Fed. Cir. 1987). It appears the focus of the duty law is to impose the duties on the goods *as they enter* the United States, even though the actual amount may not be set or assessed until a later time, even to the extent of after a 751 review.

This implementation of the countervailing duty law is in accord with the ITA's partial revocation determination in *Fasteners from India,* 47 Fed. Reg. 44129 (1982). In this publication of the ITA's final 751 review results, the ITA partially revoked an outstanding CVD order only as it pertained to dutiable goods, from a GATT country, that were entered on or after the date the goods attained duty-free status. The CVD order was maintained in effect on those goods entered prior to the effective date the dutiable goods were recognized as nondutiable.

The Court finds the ITA's implementation of § 1303, in the instant case, imposing countervailing duties without an injury determination on the subject merchandise entered prior to Mexico's accession to the GATT, was reasonable, supported by substantial evidence on the record, and lawful. The Court holds Congress has not provided for the application of any countervailing duties on a retrospective basis in this instance and the Court will not presume to grant such provisions in this case.

Plaintiffs conclude, in their summary judgment motion papers, revocation of the outstanding CVD order is the only appropriate remedy and therefore the estimated countervailing duties which have been deposited should be refunded and the corresponding entries liquidated free of duty. Plaintiffs have also asserted, in the alternative, that the ITA be directed to refund all duties collected on the PHC entries at the latest as of Mexico's accession to the GATT.

In accordance with the findings of the Court above, the Court denies the relief sought by plaintiffs. Since the Court has found defendant's determination to impose duties on the PHC reasonable, supported by substantial evidence, and in accordance with law as to the goods entered prior to Mexico's GATT accession, it follows plaintiffs' prayer for refund and liquidation for the PHC entered prior to August 24, 1986, as well as for revocation of the underlying CVD order, should be denied.

Plaintiffs' alternative request for refund of duties collected on or after August 24, 1986 and duty-free liquidation of the merchandise subject to those duties is also denied. This denial includes any request for a partial revocation of the CVD order as it might pertain to merchandise entered on or after August 24, 1986. The ITA has

addressed this contention about revocation of the CVD order, as follows:

> We believe that we lack the authority to revoke this countervailing duty order on the basis of the Understanding * * *.
>
> We are currently considering whether Mexico's accession to the GATT affects our authority to assess countervailing duties on Mexican duty-free products without an affirmative injury determination from the [ITC]. Since Mexico's accession was effective on August 24, 1986, our decision will not affect entries covered by this review, which extends only through December 31, 1984.

Portland Hydraulic Cement and Cement Clinker From Mexico; Final Results of Countervailing Duty Administrative Review, 51 Fed. Reg. 44500, 44501 (1986).

It appears the decision on the refund or liquidation issues concerning all entries imported on or after August 24, 1986 is still before the ITA. Although the ITA has stated it does not believe it has the authority to revoke or partially revoke the order, it appears the question is still under consideration by the ITA as it pertains to the Mexican merchandise entered after August 24, 1986. Customs is still being directed by the ITA to collect only *estimated* countervailing duty deposits on these goods.

More importantly, as defendant has pointed out in its opposition papers, the issue of revocation, duty-free liquidation, and refund of estimated duties on goods entered after August 24, 1986, the date of Mexico's accession, is not properly before this Court. The 751 review results covering those goods entered after August 24, 1986 have not been published and as yet remain to be challenged. The plaintiffs have only deposited estimated countervailing duties on this merchandise. No actual assessed countervailing duties have been imposed on these entries at this time.

Plaintiffs have brought their action pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a, challenging the final results of the 751 review covering PHC entered January 1, 1984 through December 24, 1984. The final results do not address or deal with the subject merchandise entered after December 24, 1984. Plaintiffs' revocation request, as it deals with the order covering PHC entered after December 24, 1984, is untimely. Plaintiffs, pursuant to 19 U.S.C. § 1516(a)(2)(A) may contest "any factual findings or legal conclusions upon which the determination is based." As set forth above, the issues of revocation, duty free liquidation, and refund of estimated duties may be raised as they pertain to factual findings or legal conclusions in the 751 review determination covering the PHC entered prior to December 25, 1984. Concerning the PHC entered in the later review periods, the ITA has not yet made any determination upon which plaintiffs may properly raise objections. Once the ITA has made a determination in these areas, then may plaintiffs

challenge the determination and any results they find unsupported by substantial evidence or otherwise contrary to law.

CONCLUSION

Based upon the discussion and legal conclusions set forth above, the Court denies plaintiffs' motion and finds judgment in favor of defendant.

This Court's order will be entered accordingly.

(Slip Op. 88–49)

RSI (INDIA) PVT., LTD., ET AL, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND PINKERTON FOUNDRY, INC., ET AL., DEFENDANT-INTERVENORS

Court No. 87–01–00086

Before DICARLO, *Judge.*

In a countervailing duty administrative review of iron metal construction castings from India, the Court affirms the decision of the International Trade Administration of the Department of Commerce (Commerce) to countervail a government subsidy program for pig iron where the formula for payments grossly overstated actual consumption of pig iron, but the Court remands for recalculation of the net ad valorem benefit. Commerce's methodology in constructing an interest rate benchmark for preshipment export loans is also affirmed.

[Affirmed in part and remanded in part.]

(Decided April 27, 1988)

Brownstein, Zeidman & Schomer (*Irwin P. Altschuler, Denise T. DePersio, David R. Amerine,* and *Ronald M. Wisla*), and *Kaplan, Russin & Vecchi* (*Dennis James, Jr.* and *Kathleen Patterson*) for plaintiffs.

John R. Bolton, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, United States Department of Justice (*Elizabeth C. Seastrum*); United States Department of Commerce (*Mark J. Sadoff*) for defendant.

Collier, Shannon, Rill & Scott (*Paul C. Rosenthal, Carol A. Mitchell* and *Robin H. Beeckman*) for defendant-intervenors.

MEMORANDUM OPINION AND ORDER

DICARLO, *Judge:* Indian exporters and United States importers of iron-metal construction castings from India (plaintiffs) move under Rule 56.1 of the Rules of this Court for judgment upon the record that the International Trade Administration of the United States Department of Commerce (Commerce) compiled in a countervailing duty administrative review. This Court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) (Supp. IV 1986) and 28 U.S.C. § 1581(c) (1982). The Court holds that Commerce's determination to countervail the entire benefit conferred by pig iron payments is supported by substantial evidence and is according to law, but that Commerce's calculation of the net benefit received by RSI (India) Pvt.,

Ltd. is not supported by substantial evidence on the record. The Court also holds that Commerce's methodology in constructing an interest rate benchmark for packing credit loans is reasonable and is according to law.

Background

Commerce determined in 1980 that the government of India was providing subsidies to Indian producers of iron-metal castings for export to the United States. *Countervailing Duties—Certain Iron-Metal Castings From India; Final Countervailing Duty Determination*, 45 Fed. Reg. 55,502 (Aug. 20, 1980). After the United States International Trade Commission determined that a United States industry was materially injured by reason of the subsidized imports, *Certain Iron-Metal Castings From India*, 45 Fed. Reg. 66,915 (Oct. 8, 1980), Commerce imposed countervailing duties on the imported products, which included manhole covers and frames, clean-out covers and frames, and catch basin grates and frames. *Certain Iron-Metal Castings From India; Countervailing Duty Order*, 45 Fed. Reg. 68,650 (Oct. 16, 1980).

At the request of the domestic producers of iron construction castings, Commerce initiated a countervailing duty administrative review of merchandise imported during 1984. R. 11–12; *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 50 Fed. Reg. 46,689 (Nov. 12, 1985). After verifying questionnaire responses, holding a public hearing, and receiving comments from interested parties, Commerce determined the net subsidy from all the programs reviewed to be 8.08% ad valorem. *Certain Iron-Metal Construction Castings From India; Final Results of Countervailing Duty Administrative Review*, 51 Fed. 45,788 (Dec. 22, 1986).

Plaintiffs filed an action in this Court to challenge Commerce's final results in its administrative review as being unsupported by substantial evidence on the agency record or otherwise not in accordance with law. One plaintiff was dismissed from the action because it was found not to be an interested party. *RSI (India) Pvt., Ltd.*, v. *United States*, 12 CIT ——, 678 F. Supp. 304 (1988).

Scope of Review

The Court will sustain Commerce's determinations in a review conducted pursuant to section 751 of the Tariff Act of 1930, as added by section 101 of the Trade Agreements Act of 1979, as amended, 19 U.S.C. § 1675 (1982 & Supp. IV 1986), if the findings are supported by substantial evidence on the record and are not contrary to law. 19 U.S.C. § 1516a(b)(1)(B) (1982). Under the substantial evidence standard for review of agency determinations, the Court will affirm the agency's findings if they are supported in the record by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Federal Trade Comm'n* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 454 (1986); *Atlantic Sugar, Ltd.* v.

United States, 2 Fed. Cir. (T) 130, 136, 744 F.2d 1556, 1562 (1984). Substantial evidence is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an agency's finding from being unsupported by substantial evidence. *ICC Indus.* v. *United States*, 812 F.2d 694, 699 (Fed. Cir. 1987); *Matsushita Elec. Indus.* v. *United States*, 3 Fed. Cir. (T) 44, 51, 750 F.2d 927, 933 (1984).

Discussion

Plaintiffs' challenges frame three questions for the Court:

1. Did Commerce act reasonably and in accordance with law in countervailing pig iron payments made under a formula which grossly overstated actual consumption of pig iron?
2. Does the record contain substantial evidence to support Commerce's calculations of the net benefit of payments to RSI (India) Pvt., Ltd.?
3. Did Commerce use a reasonable methodology in constructing an interest rate benchmark for pre-shipment export loans?

I. *International Price Reimbursement Scheme*

IPRS is a program which the government of India originally established for exporters of products with steel inputs. R. 382–83. *See Sawhill Tubular Div. Cyclops Corp.* v. *United States*, 11 CIT ——, 666 F. Supp. 1550, 1551 (1987). When domestic pig iron prices increased substantially during 1983, the Indian government extended IPRS to include products manufactured with pig iron. R. 383; 51 Fed. Reg. at 35,677. By rebating to castings exporters the difference between the higher domestic and the government-determined lower "world price" of pig iron, a professed purpose of the program is to encourage Indian manufacturers to use Indian pig iron in producing castings. Conf. R. 111; 51 Fed. Reg. at 35,677.

IPRS is administered by the Joint Plant Committee, a body composed of India's main pig iron and steel producers and chaired by an Indian government official. R. 382–83; 51 Fed. Reg. at 45,789. The Joint Plant Committee regulates the price of Indian pig iron and determines the amount of the IPRS payments. 51 Fed. Reg. at 45,789. Payments are made from the Engineering Goods Export Assistance Fund, which is financed by a levy included in domestic pig iron prices. R. 382. The Joint Plant Committee calculates the amount of IPRS payments based upon the differential between domestic and "world" pig iron prices, multiplied by the amount of castings exported and a standard factor ostensibly representing the amount of pig iron consumed. R. 383–87; Fed. Reg. at 45,789. When Commerce verified the IPRS program, however, it found significant discrepancies between theory and practice.

First, Commerce found that the standard factor for pig iron consumption in the formula used to calculate IPRS payments grossly overstated the actual amounts of pig iron consumed in producing

castings. Between January 1 and August 22, 1984, the standard factor for pig iron allocation was equal to 70% by weight of the iron content of exported castings, meaning that the rebate was calculated as if pig iron constituted 70% of the total volume of pig iron and scrap consumed in the manufacture of castings. R. 386–87; 51 Fed. Reg. at 45,789. During the latter part of 1984, the standard factor for pig iron allocation was raised to 110%. R. 386; Conf. R. 162; 51 Fed. Reg. at 45,789. An extra ten percent is used as a constant to represent the percentage of melting loss of pig iron in producing castings. R. 386. Commerce verified, however, that the Indian manufacturers' actual consumption rates were [at confidential amounts], significantly lower than either the 70% or 110% standard factors. Conf. R. 162, 175–76; 51 Fed. Reg. at 45,789.

Second, Commerce found there was no true "world price" or "international price" for pig iron, as there is for steel quoted on the Japan and London Metals exchanges. R. 385. Commerce found instead that the "world price" used to calculate IPRS payments is actually the last contract purchase by the Steel Authority of India (SAIL), an Indian government agency which purchases large quantities of pig iron to cover differences between supply and demand for domestic pig iron. R. 384–85; 51 Fed. Reg. at 45,789. SAIL floats global tenders, receives quotations from Brazil, Japan, and Pakistan, and contracts with the lowest bidder. R. 385. During 1984, the "world price" of pig iron was based SAIL's August, 1983 contract for pig iron from India's neighbor, Pakistan. R. 385.

Based upon the absence of a genuine relationship between IPRS payments and actual consumption of pig iron, and with no reliable world price for pig iron, Commerce stated that it could not determine whether the IPRS was not distorting market forces, functioned as a duty drawback scheme, or was consistent with item (d) of the Illustrative List of Export Subsidies annexed to the GATT Subsidies Code. Commerce thus found the IPRS payments to be a direct export subsidy and countervailable in full. 51 Fed. Reg. at 45,789.

1

The Indian exporters assert that to the extent that IPRS payments rebate only the difference between the price of pig iron as it is available in India and the price commercially available on world markets, the payments do not constitute an export subsidy and should not be countervailed as a matter of law under paragraph (d) of the Illustrative List of Export Subsidies, annexed to the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 513, 546, T.I.A.S. 9619, 55 U.N.T.S. 194 (the GATT Subsidies Code), which characterizes as a subsidy:

> The delivery by governments or their agencies of imported or domestic products or services for use in the production of ex-

> ported goods, on terms or conditions more favourable than for delivery of like or directly competitive products or services for use in the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favourable than those commercially available on world markets to their exporters.

The Illustrative List of Subsidies has been adopted by Congress, 19 U.S.C. §§ 1677(5)(A), 2502(1), and 2503(c)(5) (1982), but it is not exhaustive. S. Rep. No. 249, 96th Cong., 1st Sess. 84–85, *reprinted in* 1979 U.S. Code Cong. & Admin. News 381, 470–71; H.R. Doc. No. 153, 96th Cong., 1st Sess. pt. II, at 432, *reprinted in* 1979 U.S. Code Cong. & Admin. News 665, 698.

According to the Indian exporters, the GATT Subsidies Code establishes as a matter of law that where an exporter can either import raw materials at world market prices or spend more to purchase raw materials domestically, no subsidy is conferred when a government enables that exporter to purchase domestically produced raw materials at world market prices because there is no condition that is more favorable than one commercially available on world markets.

In its review results, Commerce stated that because there was no true world market price for pig iron, and because there was no apparent relationship existing between the amount of the IPRS payments and the actual consumption of pig iron, Commerce could not determine whether the operation of the IPRS program was consistent with item (d) of the Illustrative List of the GATT Subsidies Code. 51 Fed. Reg. at 45,789. In other determinations, Commerce has been able to rely upon paragraph (d) of the Illustrative List of Export Subsidies. In *Final Negative Countervailing Duty Determination; Certain Steel Wire Nails from the Republic of Korea*, 47 Fed. Reg. 39,549, 39,551 (Sept. 8, 1982), Commerce stated that under paragraph (d) "price preferences for inputs to be used in the production of export goods constitute a subsidy only if the preference lowers the price of that input below that which the input purchaser would pay on world markets." In *Final Negative Countervailing Duty Determination; Oil Country Tubular Goods from Taiwan*, 51 Fed. Reg. 19,583, 19,585 (May 30, 1986), Commerce stated that "a price preference for inputs used in the production of export goods constitutes a subsidy [under paragraph (d)] only if the preference lowers the price below world-market levels."

Because Commerce verified that there was no relationship between actual consumption of pig iron and the amount of IPRS payments for using pig iron, the Court finds that the Government of India did provide goods on terms more favorable than those commercially available on world markets. The Indian exporters' argument that the IPRS payments fall within an exception to paragraph (d) of the Illustrative List of Export Subsidies is without merit.

The Indian exporters argue that by countervailing the IPRS payments in their entirety, rather than only the amount by which the payments excessively refunded to the manufacturers the costs of using domestic pig iron in the exported castings, Commerce overstated the countervailable benefit in contravention of the countervailing duty laws. The Indian exporters also assert that Commerce was provided with and verified sufficient information to enable it to precisely calculate the excessive portion of the IPRS payments. Although the standard consumption factors in the IPRS payment formula were significantly higher than the actual consumption of pig iron, the Indian exporters urge that Commerce could have determined the amounts of pig iron incorporated into the exported castings, and could have imposed countervailing duties only to the extent that the standard rates were higher than actual consumption.

Under the countervailing duty laws, a subsidy has the same meaning as the term "bounty or grant" and is defined to include a government's provision of goods at preferential rates and a government's assumption of any costs or expenses of manufacture or production. 19 U.S.C. § 1677(5)(B)(ii) and (iv) (1982). The countervailing duty law requires that the amount of any countervailing duty imposed on foreign merchandise by "equal to the net amount of such bounty or grant, however the same be paid or bestowed." 19 U.S.C. § 1303(a) (1982). Although the phrase "net amount" is undefined, *see* S. Rep. No. 249, 1st Sess. 85, *reprinted in* 1979 U.S. Code Cong. & Admin. News 471, the countervailing duty law also requires the amount of a duty imposed to be "equal to the amount of the net subsidy." 19 U.S.C. § 1671(a) (Supp. IV 1986). To determine the "net subsidy," Congress has directed Commerce to subtract from the gross subsidy the amount of

> (A) any application fee, deposit, or similar payment paid in order to qualify for, or to receive, the benefit of the subsidy,
> (B) any loss in the value of the subsidy resulting from its deferred receipt, if the referral is mandated by Government order, and
> (C) export taxes, duties, or other charges levied on the export of merchandise to the United States specifically intended to offset the subsidy received.

19 U.S.C. § 1677(6) (1982). These three items do not expressly include the non-excessive portion of rebates as an adjustment to the amounts of a gross subsidy, and the legislative history of this provision shows that Congress intended this list to be narrowly drawn and all inclusive. S. Rep. No. 249, 96th Cong., 1st Sess. 86, *reprinted in* 1979 U.S. Code Cong. & Admin. News 472.

This Court must accord substantial weight to an agency's interpretation of statutes it administers. *American Lamb Co.* v. *United States*, 4 Fed. Cir. (T) 47, 54, 785 F.2d 994, 1001 (1986). An agency's interpretation of a statute need not be the only reasonable interpretation or the one which the court views as the most reasonable. *ICC*

Indus., 812 F.2d at 699; *Consumer Prods Div., SCM Corp.* v. *Silver Reed Am., Inc.*, 3 Fed. Cir. (T) 83, 90, 753 F.2d 1033, 1039 (1985). However, "[t]he traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress." *Board of Governors of the Fed. Reserve Sys.* v. *Dimension Fin. Corp.*, 106 S. Ct. 681, 686 (1986). The Court's role when that intent is not contravened is to determine whether the agency's interpretation is "sufficiently reasonable." *American Lamb*, 4 Fed. Cir. (T) at 54, 753 F.2d at 1001. This Court has also held that while Commerce may choose a methodology in its discretion to calculate the net benefits of bounties or grants, any methodology employed must reasonably and accurately reflect factual information contained in the administrative record as a whole. *See Ceramica Regiomontana, S.A.* v. *United States*, 10 CIT ——, 636 F. Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987); *British Steel Corp.* v. *United States*, 10 CIT ——, 632 F. Supp. 59, 68 (1986); *Alhambra Foundry* v. *United States*, 9 CIT 632, 636, 626 F. Sup. 402, 408 (1985).

The Indian exporters correctly note that each of the Indian manufacturers provided Commerce with information on their sales and their actual pig iron and scrap usage rates. *See* R. 52–53, Conf. R. 8–9, 32–39. Through an on-site verification at two of the companies, Commerce verified the actual scrap and pig iron ratios for these two companies and confirmed the accuracy of their reported rates. Conf. R. 176 (RSI), 192 (Serampore).

Although Commerce could calculate the actual amounts of pig iron consumption for the IPRS formula from the verified figures for RSI and Serampore and from the non-verified figures for the other exporters, the payments made bore absolutely no relationship to actual consumption of pig iron. It is not the responsibility of Commerce to tinker with a program of the Indian government to make it non-countervailable. The Court upholds Commerce's construction of the statute and the methodology employed. The Court finds that Commerce's determination is supported by substantial evidence on the record and is according to law.

2

The Indian exporters also contend that the IPRS program functions in a fashion similar to two prior determinations where Commerce found that two-tier pricing structures resulting from duty drawback schemes did not confer a bounty or grant. *Certain Steel Wire Nails from the Republic of Korea*, 47 Fed. Reg. at 39,549, and *Oil Country Tubular Goods from Taiwan*, 51 Fed. Reg. at 19,585.

Korea's duty drawback system created a two-tier pricing system in *Steel Wire Nails*, where a largely-government owned steel producer charged lower prices for rod used to fabricate export products and higher prices for rod used to fabricate products sold domestically. The price of steel imported for the domestic market was higher because it carried customs duties, while the price of imported steel

for export products was lower because it did not carry duties that would be refunded. Commerce thus found the two-tier pricing structure to be a commercial response to segmented markets rather than a countervailable scheme to subsidize exports. 47 Fed. Reg. at 39,551.

In the determination concerning *Oil Country Tubular Goods from Taiwan*, the petitioners alleged a State-owned corporation provided raw materials at preferential prices. Commerce determined that a higher, first-tier price was based upon the "duty-paid" price of imported hot-rolled coil, while a lower, second-tier price was offered to manufacturers of goods for export at the "duty-free" price of hot-rolled coil. Upon examining the second-tier prices, Commerce found the duty free prices to be at world-market levels and determined that the two-tier pricing policy conferred no countervailable benefit. 51 Fed. Reg. at 19,585.

According to the Indian exporters, the IPRS creates a two-tier pricing structure similar to those investigated in the Republic of Korea and the Republic of China:

> One tier consists of higher priced pig iron for domestic consumption, supported by high import duties. The second tier provides lower priced pig iron (approximating world prices) for use in export production. This pricing structure provides protection to the domestic pig iron industry, but enables the export industries that use pig iron * * * to remain internationally competitive.
>
> The IPRS program is thus similar in operation to the familiar customs duty drawback system * * *. Non-excessive rebates paid to offset the price differential between imported raw material prices and world market raw material prices caused by a protective tariff are not countervailable. [Citations omitted]. Similarly, a program promoting the use of domestic raw materials rather than imported raw materials, and providing a rebate equal to the price differential between the world price and the domestic price of raw materials consumed in the manufacture [of] a finished product, should not be considered countervailable.

Brief in Support of Plaintiffs' Motion for Judgment on the Agency Record, at 18–19.

It is agreed that the drawback, rebate, or remission of Customs duties not in excess of the actual duties due or paid on imported items physically incorporated in the final product is not regarded as a countervailable subsidy, 19 C.F.R. § 355, Annex 1, ¶3 (1987), nor is a non-excessive remission of indirect taxes. *Zenith Radio Corp.* v. *United States*, 437 U.S. 443 (1978); *Industrial Fasteners Group* v. *United States*, 1 Fed. Cir. (T) 81, 84, 710 F.2d 1576, 1579 (1983).

Commerce argues that the IPRS bears no resemblance to the duty drawback programs in the Republic of Korea or the Republic of China which the Indian exporters hold out as support. Each of those determinations related two-tier pricing structures to the refund or

remission of actual duties. Commerce also maintains that IPRS operates without the type of administrative controls normally associated with a drawback of duties paid on imported merchandise physically incorporated in the exported products. In its review results, Commerce stated that because there was no apparent relationship between the amount of the IPRS payments and actual consumption of pig iron, and because there was no true world price for pig iron, Commerce could not determine whether IPRS payments functioned as a duty drawback scheme. 51 Fed. Reg. at 45,789.

The record does not contain sufficient evidence to support the Indian exporters' claim that IPRS payments function as a duty drawback scheme. The Court finds that in the absence of any relationship between pig iron payments and consumption, and in the absence of any controls normally associated with a duty drawback program, Commerce acted reasonably in determining that it could not determine whether IPRS payments functioned as a duty drawback program.

3

The Indian exporters also assert that Commerce's determination to countervail the IPRS program in its entirety is arbitrary and capricious and constitutes an abuse of administrative discretion. Upon review of the administrative record, and upon review of the arguments already discussed, the Court finds these assertions to be without merit. This part of the action is affirmed.

II. *Calculation of the Net Benefit of IPRS Payments*

RSI (India) Pvt., Ltd. argues that Commerce overstated the net benefit of RSI's IPRS payments, claiming that Commerce should have allocated RIS's reported IPRS payments over exports of all castings rather than exports of only those castings under investigation.

In response to Commerce's questionnaire request for the amount of IPRS payments for the exported castings under investigation (i.e., heavy castings), RSI reported its total IPRS payments for all the castings it exported, including castings not under investigation (i.e., light castings). Conf. R. 10–11, 43–44, 169, 278–80. RSI also reported the total value of exports of the subject (heavy) castings to all countries and to the United States. R. 392; Conf. R. 9. Commerce verified RSI's questionnaire responses concerning castings exports and IPRS payments. R. 392–95.

Commerce calculated the net countervailable benefit bestowed by the IPRS program by totalling all IPRS payments each Indian exporter reported for 1984 and dividing these payments by each company's total exports of subject castings. R. 455; Conf. R. 211. Commerce derived an ad valorem benefit then weighted by each company's share of exports to the United States of the castings under investigation. R. 455; Conf. R. 211.

Following publication of the preliminary determination, *Certain Iron-Metal Construction Castings From India; Preliminary Results of Countervailing Duty Administrative Review*, 51 Fed. Reg. 35,676 (Oct. 7, 1986), the Indian exporters notified Commerce that the calculation for RSI was incorrect because the IPRS payments for all casting products exported (both lightweight castings not under investigation and heavy castings that were under investigation) was divided by the export value of only those castings under investigation. Conf. R. 278–80. Because the numerator in this equation included IPRS payments RSI received for all castings exports, the Indian exporters asked Commerce to amend the denominator to reflect the value of all castings exports. It is Commerce's failure to make this correction in the final determination that the Indian exporters challenge.

As stated earlier, Commerce may choose a methodology in its discretion to calculate the net benefit of a subsidy, but any methodology employed must reasonably and accurately reflect factual information contained in the administrative record as a whole. *Ceramica Regiomontana*, 10 CIT at ——, 636 F. Supp. at 966; *British Steel Corp.*, 10 CIT at ——, 632 F. Sup. at 68; *Alhambra Foundry*, 9 CIT at 636, 626 F. Supp. at 408. Furthermore, the countervailing duty law requires the amount of any countervailing duty imposed on foreign merchandise to be "equal to the net amount of such bounty or grant, however the same be paid or bestowed," 19 U.S.C. § 1303(a) (1982), and "equal to the amount of the net subsidy." 19 U.S.C. § 1671(a) (Supp. IV 1986).

The Court finds that Commerce's methodology does not reasonably and accurately reflect factual information contained in the administrative record. The information relied upon was verified, and Commerce made the same requested correction for another Indian exporter, Serampore Industries Pvt., Ltd. This part of the action is reversed and remanded to Commerce to recalculate the net ad valorem benefit for RSI, and to recalculate the weighted average countrywide rate using the corrected RSI ad valorem rate.

III. *Packing Credit Loans*

Commerce determined that through commercial banks, the Reserve Bank of India provided short-term, packing credit loans to exporters at preferential rates of interest. *See*, 51 Fed. Reg. at 45,790. Commerce found that during 1984, the Reserve Bank of India provided loans to exporters at the rate of 12% interest per anum for 90 day loans, 14.5% for 135 day loans, and 16.5% for 180 days. R. 388, 418, 456.

Commerce verified that there is no national average short-term commercial rate in India, but that actual non-preferential interest rates on short-term commercial loans varied between 16.5% and 18.5% in 1984, depending on the level of borrowing. R. 388–89; 51 Fed. Reg. at 45,790. For loans of 2 rupees (Rs.) to Rs. 25 lakhs (one

lakh equals 100,000 rupees, and is written in India as 1,00,000), the average interest rate was 16.5%. R. 389. For loans over Rs. 25 lakhs, the average interest rate was 18%. *Id.*

In calculating the amount of the countervailable subsidy, Commerce used a benchmark of 18% to measure the benefit conferred by the loans, because Commerce "could not know what the rate would be to the exporters." 51 Fed. Reg. at 45,790. The 18% rate represents the average interest rate for loans over Rs. 25 lakhs. The Indian exporters assert that the benchmark of 18% is too high.

Commerce has stated that an appropriate national average benchmark for short term loans "should reflect the predominant alternative sources of short term financing available to an average firm." *Oil Country Tubular Goods From Argentina; Final Results of Countervailing Duty Administrative Review*, 52 Fed. Reg. 846, 848 (Jan. 9, 1987). This statement is based on Commerce's established policy that Commerce will not look to company-specific experience in calculating a benchmark for short-term interest rates. Subsidies Appendix, *Cold-Rolled Carbon Steel Flat-Rolled Products From Argentina: Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 49 Fed. Reg. 18,006, 18,020 (Apr. 26, 1984).

The Indian exporters argue that Commerce verified that the exporters subject to review secured commercial loans at less than 18%. RSI received a 16.5% short-term loan from the Bank of Maharashtra, and Serampore Industries received a cash credit loan at 17.5%. R. 403, 418. Commerce also examined newspaper advertisements for open market interest rates of 14% and 15% under fixed deposit schemes. R. 403. However, nothing in the record suggests that RSI's or Serampore's loans, or loans connected to fixed deposit schemes, reflect a predominant alternative source of short term financing available to an average firm in India. Commerce's decision not to include the company-specific experiences is consistent with its established policy for short-term loans.

The Indian exporters also suggest a benchmark of 17.25% as a compromise between 16.5% and 18% interest rates. Commerce rejected this approach in its final administrative review, and used the average interest rate for loans over Rs. 25 lakhs. 51 Fed. Reg. at 45,790. The Court finds that while the Indian exporters suggest an equitable resolution, there is no legal support for adopting its solomonic solution.

The record confirms that there is no national average which Commerce could employ as a benchmark. *See Alhambra Foundry* v. *United States*, 9 CIT 632, 635, 626 F. Supp. 402, 407 (1985), and Commerce determined that it could not know what actual rates exporters would receive. "As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the Court will not impose its own views as to

the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomontana, S.A.* v. *United States*, 10 CIT ——, 636 F. Supp. 961, 967 (1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987). The Court holds that Commerce's decision to use an 18% commercial interest rate benchmark for short term loans is supported by substantial evidence on the administrative record and is according to law.

CONCLUSION

Commerce's determination to countervail the IPRS payments in full is supported by substantial evidence on the record and is according to law, but the action is remanded to Commerce to recalculate the net ad valorem benefit for RSI and to recalculate the weighted average countrywide rate using RSI's new ad valorem rate. Commerce's use of an 18% interest rate benchmark is affirmed.

(Slip Op. 88–50)

FORMER EMPLOYEES OF LEVOLOUR LORENTZEN, PLAINTIFF *v.* U.S. SECRETARY OF LABOR, DEFENDANT

Court No. 87-12-01209

Before MUSGRAVE, *Judge*.

[Defendant's motion to dismiss granted.]

(Decided April 28, 1988)

Eva Daisy Lazo, (on behalf of Former Employees of Levolour Lorentzen) *pro se*.

Richard K. Willard, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, (*M. Martha Ries*, on the motion) for the Defendant.

OPINION

MUSGRAVE, *Judge*: Plaintiffs, pro se, challenge the denial by the Secretary of Labor of benefits claimed by them under the Trade Act of 1974. 19 U.S.C. §§ 2271–2321, 2395 (1982 & Supp. III 1985). Defendant moves for dismissal on the grounds that Plaintiffs' claims do not fall within the period prescribed by the statute and therefore do not state a claim as to which relief can be granted. As Plaintiffs in fact do not come within the scope of the statute, defendant's motion to dismiss must be and it is hereby GRANTED.

BACKGROUND

On August 13, 1987 the Department of Labor certified the workers of Levolour South Venetian Blinds as eligible to apply for Trade Adjustment Assistance. The impact date, identifying when unem-

ployed workers became eligible for benefits, was set as May 28, 1986.

Plaintiffs were terminated from employment with Levolour South Venetian Blinds during December, 1985 and January, 1986. They petitioned the Office of Trade Adjustment Assistance of the Department of Labor (LABOR) on November, 1987, more than twenty-two months after the last of such terminations. On December 2, 1987 LABOR informed Plaintiffs that they were not eligible for assistance under the relevant statute, 19 U.S.C. § 2272. Plaintiffs, on December 10, 1987 sent a letter to this Court, which the Court accepted as a summons and complaint, stating that Plaintiffs felt that it was unfair "that some are able to receive benefits which we are not * * * when the only difference is the date of employment." Plaintiffs asked that this Court "study [this] case."

The Court has indeed studied Plaintiffs' case and would like to view their claims sympathetically; however, the statute is clear, as is case law, on the subject. 19 U.S.C. § 2273(b)(1) provides:

> (b) A certification under the section shall not apply to any worker whose last total or partial separation from the firm or appropriate subdivision of the firm before his application under section 2291 of the title occurred—
>
> > (1) more than one year before the date of the petition on which such certification was granted * * *.

The date of the petition on which certification was granted for the workers at Levolour was June 15, 1987. As indicated earlier, Plaintiffs were terminated from employment during December, 1985 and January, 1986. It is clear, then, that their separation took place more than one year before the date of the petition, and they are therefore not eligible for assistance under the statute.

The necessity of complying with the statutory requirements of filing for assistance has been strictly construed by this Court in *Former Employees of Travenol Laboratories, Inc.*, 11 CIT——, Slip Op 87-24 (March 9, 1987), *See Former Employees of Westmoreland Manufacturing Co.* v. *United States,* 10 CIT——, 650 F. Supp. 1021 (1986), and must be considered settled. See also *Lloyd* v. *U.S. Department of Labor* 637 F.2d 1267 (9th Cir. 1980).

With respect to the question—not urged by Plaintiffs but relevant nonetheless—of whether some equitable right arises from the (apparent) failure of LABOR to advise Plaintiffs of their rights, *Westmoreland* (opinion cited supra) considered and discussed this question at length, and concluded that no such right exists. We concur with that conclusion.

The Court therefore has no alternative but to dismiss Plaintiff's complaint and grant Defendant's motion to dismiss.

(Slip Op. 88-51)

ALHAMBRA FOUNDRY CO., LTD., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND KEJRIWAL STEEL AND IRON WORKS, ET AL. DEFENDANT-INTERVENORS

Court No. 86-04-00484

Before DICARLO, *Judge.*

In a domestic industry's challenge to zero and *de minimis* margins of dumping that the International Trade Administration of the United States Department of Commerce (Commerce) found in an antidumping investigation of iron construction castings from India, the Court holds that (1) Commerce's treatment of Indian government payments as an adjustment to cost of materials is inconsistent with Commerce's treatment of the same payments in another determination as a circumstance of sale adjustment; (2) Commerce's methodology in calculating general sales and administrative expenses is supported by substantial evidence and is in accordance with law; (3) Commerce was reasonable to use an 8 percent profit figure in constructing foreign market value; (4) Commerce must explain the basis for finding two margins of dumping *de minimis;* (5) the domestic producers' request to order recalculations for a company that Commerce found was dumping is outside the scope of the complaint and request for relief; and (6) the Court lacks jurisdiction to grant the Indian exporters' additional motion to recalculate the Indian Central Sales Tax.

[Action affirmed in part and remanded in part. Defendent-Intervenors' motion for remand denied for lack of jurisdiction.]

(Decided April 27, 1988)

Collier, Shannon, Rill & Scott (Paul C. Rosenthal and *Carol A. Mitchell)* for plaintiffs.

John R. Bolton, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, United States Department of Justice *(Platte B. Moring, III);* United States Department of Commerce, Office of the Deputy Chief Counsel for Import Administration *(Duane W. Layton),* for defendant.

Kaplan, Russin & Vecchi (Dennis James, Jr.) for defendant-intervenors.

MEMORANDUM OPINION AND ORDER

DICARLO, *Judge:* The International Trade Administration of the United States Department of Commerce (Commerce) investigated four exporters of iron construction castings from India and determined that one exporter was dumping merchandise, that one exporter was not dumping, and that two other exporters were dumping at only *de minimis* levels. *Certain Iron Construction Castings From India; Final Determination of Sales at Less Than Fair Value,* 51 Fed. Reg. 9,486 (Mar. 19, 1986). The Indian exporter found to be dumping challenged that finding in *Serampore Indus.* v. *United States,* 11 CIT ——, 675 F. Supp. 1354 (1987). In this action United States producers of iron construction castings challenge Commerce's other findings of zero and *de minimis* dumping margins.

This Court has jurisdiction pursuant to 19 U.S.C. § 1516a(2) (Supp. IV 1986) and 28 U.S.C. § 1581(c) (1982). Plaintiffs move under Rule 56.1 of the Rules of this Court for judgment on the agency record and ask the Court to remand to Commerce for certain recalculations. Commerce concedes that it erred in making some of the

challenged calculations and asks the Court to remand in part. The Court affirms in part and remands in part.

Background

The Municipal Castings Fair Trade Council and fifteen domestic producers of iron construction castings filed a petition with Commerce under 19 U.S.C. § 1673a(b) (1982) and 19 C.F.R. § 353.36 (1985), alleging that iron construction castings from India are being sold in the United States at less than fair value, and that these imports are materially injuring or threatening material injury to a United States industry. Commerce selected four Indian exporters of iron construction castings to be the respondents in this action: RSI India Pvt. Ltd. (RSI), Kejriwal Iron & Steel Works (Kejriwal), Kajaria Castings Pvt. Ltd. (Karjaria), and Serampore Industries Pvt. Ltd. (Serampore). *Iron Construction Castings From India: Preliminary Determination of Sales at Less Than Fair Value,* 50 Fed. Reg. 43,595, 43,595–96 (Oct. 28, 1985).

In its final determination of sales at less than fair value, Commerce found a zero percent dumping margin for RSI, a 0.39 percent margin for Kejriwal, and a 0.03 percent margin for Kajaria. 51 Fed. Reg. at 9,490. In the final determination and subsequent antidumping duty order, Commerce excluded the results for Kejriwal and Kajaria as having only *de minimis* margins of dumping. *Id.*; *Antidumping Duty Order; Iron Construction Castings From India,* 51 Fed. Reg. 17,221 (May 9, 1986). No antidumping duties were assessed against RSI, Kejriwal or Kajaria. The domestic producers filed an action in this Court to challenge Commerce's results for RSI, Kejriwal and Kajaria. Complaint a at 4.

Scope of Review

In reviewing final Commerce determinations in antidumping duty investigations, the Court will hold unlawful those determinations found "to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1982); *Luciano Pisoni Fabbrica Accessori Instrumenti Musicali* v. *United States,* 837 F.2d 465, 467 (Fed. Cir. 1988). Under the substantial evidence standard for review of agency determinations, the Court will affirm the agency's findings if they are supported in the record by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Federal Trade Comm'n* v. *Indiana Fed'n of Dentists,* 476 U.S. 447, 454 (1986); *Atlantic Sugar, Ltd.* v. *United States,* 2 Fed. Cir. (T) 130, 136, 744 F.2d 1556, 1562 (1984). The Court must also accord substantial weight to an agency's interpretation of a statute it administers. *American Lamb Co.* v. *United States,* 4 Fed. Cir. (T) 47, 54, 785 F.2d 994, 1001 (1986). An agency's statutory interpretation need not be the only reasonable interpretation, or the one which the Court views as the most reasonable. *ICC Indus.* v. *United States,* 812 F.2d 694, 699 (Fed. Cir. 1987); *Consumer*

Prods. Div., SCM Corp. v. *United States*, 3 Fed. Cir. (T) 83, 90, 753 F.2d 1033, 1039 (1985). However, "[t]he traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress." *Board of Governors of the Fed. Reserve Sys.* v. *Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986).

Discussion

The domestic producers assert that Commerce's final antidumping determination includes numerous factual and legal errors which had the effect of substantially understating the weighted-average dumping margins for the companies investigated. The domestic producers thus contend that Commerce's final determination violates the antidumping laws and regulations and is unsupported by substantial evidence on the record.

1. *CONSTRUCTED FOREIGN MARKET VALUE CALCULATIONS*

When Commerce is unable to determine the foreign market value (FMV) of imported merchandise under 19 U.S.C. § 1677b(a)(1)(A) (1982), Congress allows Commerce to construct a FMV to compare to the United States price (USP) and thus determine whether merchandise is being dumped in the United States. 19 U.S.C. § 1677b(a)(2) (1982). Congress has directed that Commerce construct FMV by adding the costs of materials, fabrication or processing, general expenses, profit, and the cost of containers for shipping to the United States. 19 U.S.C. § 1677b(e)(1) (1982 & Supp. III 1985); *Timken Co.* v. *United States*, 11 CIT ——, 673 F. Supp. 495, 506 (1987). The domestic producers conceded at oral argument that Commerce was correct in using a constructed FMV. However, they challenge Commerce's calculations of (a) the cost of materials, (b) general expenses, and (c) profit.

a. *Cost of Materials*

The record shows that in September of 1983, Indian pig iron prices increased significantly as compared to the prices for pig iron from other nations, R. 1345–46, and that the Indian government used an International Price Reimbursement Scheme (IPRS), a system of payments to offset the difference between the cost of pig iron in India and an ostensible world price for pig iron. This Court recently reviewed the IPRS program for pig iron in the context of countervailing duties. *RSI (India) Pvt. Ltd.* v. *United States*, 12 CIT ——, Slip Op. 88–49 (Apr. 27, 1988). *See also Sawhill Tubular Div. Cyclops Corp.* v. *United States*, 11 CIT ——, 666 F. Supp. 1550, 1551 (1987) (IPRS payments for steel).

The domestic producers assert that Commerce's constructed foreign market value calculations improperly failed to exclude IPRS payments. Commerce and the Indian exporters reply that the domestic producers did not raise this issue during the administrative proceedings and thus argue that the Court should apply the doc-

trine of exhaustion of administrative remedies and not consider this issue.

Exhaustion of administrative remedies is an absolute requirement in the Court of International Trade only in classification actions, with a limited exception for pre-importation classification rulings. *See* 28 U.S.C. § 2637 (1982). In all other civil actions before this Court, Congress has directed only that "the Court of International Trade shall, *where appropriate,* require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d) (1982) (emphasis added). The judicial determination of whether to require exhaustion of remedies in non-classification actions is thus individual to the circumstances of each case, with each exercise of judicial discretion in not requiring litigants to exhaust administrative remedies characterized as "an exception to the doctrine of exhaustion." *See Timken Co.* v. *United States,* 10 CIT ——, 630 F. Supp. 1327, 1334 (1986).

The Court of International Trade has found exceptions to the exhaustion doctrine when requiring exhaustion would be futile or an insistence on a useless formality. *See, e.g., Rhone Poulenc, S.A.* v. *United States,* 7 CIT 133, 135, 583 F. Supp. 607, 610 (1984). The Court has also declined to require that plaintiffs pursue channels which could not lead to relief or pursue "manifestly inadequate" remedies. *United States Cane Sugar Refiners' Ass'n* v. *Block,* 3 CIT 196, 201, 544 F. Supp. 883, 887, *aff'd,* 69 CCPA 172, 683 F.2d 399 (1982); *Luggage and Leather Goods Mfrs. of Am.* v. *United States,* 7 CIT 258, 266–67, 588 F. Supp. 1413, 1420–21 (1984). The "manifestly inadequate" standard is a limited one, however, because "mere allegations of financial harm, or assertions that an agency failed to follow a statute, do not make the remedy established by Congress manifestly inadequate." *National Corn Growers Ass'n* v. *Baker,* Nos. 87–1147 etc., at 25 (Fed. Cir. Feb. 9, 1988) (quoting *Miller & Co.* v. *United States,* 824 F.2d 961 (Fed. Cir. 1987), *cert. denied,* 108 S. Ct. 773 (1988)).

The Court of International Trade has also recognized an exception to the exhaustion doctrine where judicial interpretations of existing law are made after the contested administrative determination was published, and the new interpretation might have materially altered the agency result. *See Timken Co.* v. *United States,* 10 CIT ——, 630 F. Supp. 1327, 1334 (1986); *Rhone Poulenc, S.A.* v. *United States,* 7 CIT 133, 134–35, 583 F. Supp. 609–10 (1984). The Court has also found it appropriate to consider claims not raised before the agency where Commerce did not adhere to controlling judicial precedents and where the plaintiff's arguments were based on facts available only in the confidential administrative record and the plaintiff was not timely informed of the deadline for access to the confidential record of business proprietary information. *Phillipp Bros., Inc.* v. *United States,* 10 CIT ——, 630 F. Supp. 1317, 1320 (1986).

The defendant notes that while the domestic producers inquired about the IPRS program and the Indian exporters' raw material costs, the domestic producers never voiced any concern about whether the constructed value statute prohibited the deduction of the IPRS payments from the Indian exporters' raw material costs. The domestic producers knew at an early stage of the administrative proceedings that the Indian companies reported their pig iron costs net of IPRS payments, R. 1019, 1040–41, 1048–49, 1070, 1270. Prior to the administrative hearing, the domestic producers wrote to Commerce discussing the IPRS in general terms, but did not comment on the relationship between the constructed value statute and the IPRS. R. 939, 993–94, 1163–64. The domestic producers claim that they did not learn that Commerce used IPRS payments to reduce the cost of materials in the final determination until the cost verification exhibits and complete final constructed value calculations were filed on February 10 and March 10, 1987 as amendments to the administrative record before this Court. *Plaintiffs' Memorandum in Response to Question re Exhaustion of Administrative Remedies,* at 2, n.1.

In February of 1986, Commerce issued its verification report on each respondent's cost of production. With reference to IPRS, Commerce outlined the application and payment procedures:

> Export manufacturers apply for the IPRS refund furnishing proof of both finished goods shipment and pig iron purchases* * *. [R]eimbursement occurs five to six weeks after filing if the application is complete.

R. 1347. Although the report verified that IPRS payments were made after exportation of the subject merchandise, the domestic producers did not comment at the hearing or in their post-hearing brief on the IPRS issue presently before the Court.

The domestic producers principal concern following the release of the verification report was the relationship between the IPRS and the Indian tax rebate program known as Cash Compensatory Support (CCS). *See* Conf. R. 1302, 1438. Commerce thus responded only to this aspect of the IPRS payments issue in the final determination. 51 Fed. Reg. at 9,488.

Although the domestic producers consistently argued that the Indian exporters' material cost figures were too low, they never argued that IPRS payments should not be taken into account in constructing FMV. The domestic producers state that "[d]espite repeated expressions of concern about [Commerce's] treatment of the IPRS rebate in calculating [the Indian exporters'] constructed value, [Commerce's] final calculations reflected material costs net of IPRS." *Plaintiffs' Memorandum in Support of Motion for Judgment on the Administrative Record,* at 17. The Indian exporters correctly observe that the domestic producers did not express concern about "treatment of the IPRS rebates" or argue that deducting IPRS was inappropriate, unreasonable, or not in accordance with law. For ex-

ample, after Kajaria explained that its reported raw material costs were "derived on the basis of actual charges paid for scrap, pig iron, etc. and the deduction of the IPRS factor from the raw material cost," R. 1041, the domestic producers commented that the "reported raw material costs made even less sense after taking the IPRS factor into account." R. 1163. However, at no time during the administrative proceedings did the domestic producers argue that IPRS payments should not be taken into account. Commerce did not have an opportunity to comment on the IPRS issue that the domestic producers now raise because it was not first raised during the administrative proceedings. In *Kokusai Elec. Co.* v. *United States*, 10 CIT ——, 632 F. Supp. 23, 28 (1986), this Court stated that "a reviewing court would usurp the function of the agency if it were to set aside an administrative determination upon a ground not previously presented, thereby depriving the agency of a chance to consider the matter." To the extent that the domestic producers could have raised issues concerning the IPRS payments during the course of the administrative proceedings, the Court finds it appropriate to require the exhaustion of administrative remedies.

The Court does not exclude all of the domestic producers' arguments, however, because the domestic producers also point to a decision of this Court, rendered subsequent to Commerce's final determination, which offered an alternative treatment of the IPRS payments at issue in this case. In *Sawhill Tubular Div. Cyclops Corp.* v. *United States,* 11 CIT ——, 666 F. Supp. 1550 (1987), the court found that Commerce acted reasonably and within the law to account for IPRS payments as circumstance of sale adjustment to FMV. *Sawhill* was a challenge to the final affirmative antidumping duty determination in *Certain Welded Carbon Steel Standard Pipe and Tube From India,* 51 Fed. Reg. 9,089 (Mar. 17, 1986), published only two days before Commerce's final determination in this case. In the *Sawhill* determination, Commerce made a circumstance of sale adjustment to FMV pursuant to 19 C.F.R. § 353.15 for IPRS payments. Specifically, Commerce deducted IPRS payments from FMV in the amount of the rebate payment (i.e., the difference between the cost of steel in India and the international price of steel).

The domestic producers argue that Commerce's treatment of IPRS rebates as reducing the cost of materials in the constructed FMV calculations should not be upheld in this case because it is inconsistent with Commerce's treatment of IPRS rebates in *Sawhill* as a circumstance of sale adjustment.

Commerce argues that its adjustment to material costs for IPRS rebates is consistent with the circumstance of sale adjustment made in *Sawhill* because that determination involved a price to price comparison between pipe and tube sold in India and that sold in the United States, while the Indian exporters in this case have insufficient sales in their home or third country markets to serve as a basis for comparing FMV with United States price.

The domestic producers reply that this alleged distinction is insupportable because Commerce has made circumstance of sale adjustments in both price and constructed FMV analyses, *see, e.g., Cellular Mobile Telephones and Subassemblies from Japan; Final Determination of Sales at Less Than Fair Value,* 50 Fed. Reg. 45,447 (Oct. 31, 1985); *Certain Electric Motors from Japan; Final Results of Administrative Review of Antidumping Duty Order,* 49 Fed. Reg, 32,627 (Aug. 15, 1984), and because Commerce's authority to make circumstance of sale adjustments in cases involving constructed FMV analyses was upheld by this Court in *Timken Co.* v. *United States,* 11 CIT ——, Slip Op. 87-118, at 25 (Oct. 29, 1987), which found that because FMV is defined under 19 U.S.C. § 1677b(a)(2) to include constructed value, the differences in circumstances of sale adjustment in 19 U.S.C. § 1677b(a)(4), "by the literal language of the statute, must by applied to constructed value as well as to price-based foreign market value."

The Court agrees with the domestic producers that Commerce's treatment of IPRS payments has been inconsistent from the practice approved in *Sawhill.* An agency must either conform itself to its prior decisions or explain the reasons for its departure. *Secretary of Agric.* v. *United States,* 347 U.S. 645, 653–54 (1954); *Mitchell Energy Corp.* v. *Federal Energy Regulatory Comm'n,* 580 F.2d 763, 765 (5th Cir. 1978), *cert. denied,* 456 U.S. 974 (1982). The Court remands to Commerce for an explanation of why the practice in this case is different from *Sawhill,* or, in the alternative, recalculation of the IPRS rebates as a circumstance of sale adjustment to conform to the practice approved in *Sawhill. See Plaintiffs' Reply Memorandum* at 5–6.

b. *General Sales and Administrative Expenses*

The domestic producers initially claimed that Commerce improperly allocated RSI's general sales and administrative expenses on the basis of the number of RSI employees. The domestic producers acknowledge in their reply brief that their assignment of error on this point was based on a misreading of the administrative record. The domestic producers now agree that Commerce allocated general and administrative expenses on the basis of office salaries, and not the number of employees. However, the domestic producers still argue that Commerce simply ignored the office salaries paid to employees common to all three of RSI's divisions.

Since RSI makes and sells more than just iron construction castings, Commerce could not allocate all of the company's general and administrative expenses to the division that produces the products under investigation. In its final determination, Commerce allocated general and administrative expenses among RSI's Import Division, Applied Power and Engineering Division, and Foundry and Export Division on the basis of office salaries exclusive to any one division. 51 Fed. Reg. at 9,488–89. The record reflects further that the sala-

ries of employees who worked for all three divisions were excluded from the calculation of the total office salaries for a particular division, but were included in the calculation of RSI's total general and administrative expenses. Conf. R. Doc. 68 at B. Commerce thus determined the total office salaries for each division, and then allocated a portion of the general expense of RSI to the Foundry Division based upon its proportion of RSI's total office salaries. Conf. R. 1113–14. The Court finds that Commerce's methodology in this investigation is supported by substantial evidence and is in accordance with law.

c. *Profit.*

The domestic producers contend that Commerce improperly used theoretical, rather than actual, profit figures in its constructed value calculations. The domestic producers argue that the Congress has required Commerce to use only actual profit figures unless the amount of an investigated exporter's profit is below eight percent.

The antidumping laws of the United States instruct Commerce to calculate constructed foreign market value by including

> an amount for general expenses and profit equal to that *usually reflected* in sales of merchandise of the same general class or kind as the merchandise under consideration which are made by producers in the country of exportation, in the usual commercial quantities and in the ordinary course of trade, except that—
>
> * * * * * * *
>
> the amount for profit shall not be less than 8 percent of the sum of such general expenses and cost* * *.

19 U.S.C. § 1677b(e)(1)(B)(ii) (1982 & Supp. IV 1986) (emphasis added). *See also* 19 C.F.R. § 353.6(a) (1987).

In its construction of FMV, Commerce used only the statutory minimum of 8% to represent the amount of profit. Commerce's final determination states that "[b]ecause the respondent companies do not have viable home market or third country market sales, the profit used in the constructed [foreign market] value for all four companies was the statutory minimum 8 percent of the total manufacturing cost plus sales, general, and administrative [SG&A] expenses." 51 Fed. Reg. at 9,488. Commerce states that this decision was reasonable because none of the exporters had sufficient sales within India or to any third country to permit a reasonable determination of home market or third country profit.

The domestic producers argue that Commerce should have followed *Antidumping—Strontium Nitrate From Italy; Final Determination of Sales at Less Than Fair Value,* 46 Fed. Reg. 25,496 (May 7, 1981), which announced three factors that Commerce would look to in order to calculate profit for purposes of constructed value in future cases:

> [1] profits on home market sales of comparable merchandise by the individual producer under investigation;
>
> [2] profits on third country sales of comparable merchandise by the individual producer under investigation, to the extent such information is readily available; or if not,
>
> [3] profits on home market sales of comparable merchandise by the industry.

46 Fed. Reg. at 25,497.

The record confirms that Commerce verified that Kajaria and Serampore had no home market or third country sales for the products under investigation and no home market or third country sales of similar merchandise during the period of investigation R. 1243, 1330; Conf. R. 994, 1073, 1160, 1313. The record also shows that Commerce verified that Kejriwal and RSI had virtually no home market or third country sales for the products under investigation and no home market or third country sales of similar merchandise during the period of investigation. R. 1264, 1285; Conf. R. 1094, 1115, 1192, 1372. The record thus provides substantial evidence to support Commerce's determination that it could not use either of the first two elements announced in *Strontium Nitrate From Italy.*

The Court also finds that Commerce acted reasonably in not resorting to the industry profits option announced in *Strontium Nitrate From Italy,* the "profits on home market sales of comparable merchandise by the industry." 46 Fed. Reg. at 25,497.

A finding of dumping is a determination that a specific company is selling goods below cost or at a price below that charged in the domestic market. A company can avoid sales at less than fair value by raising its prices, which in the absence of rising costs of input, will raise that company's profit margin. Use of another company's profits to determine whether an investigated company is dumping may send the wrong message to the investigated company. Application of an average of several producers' profits would also tend to deprive any single producer of knowledge of the total amount of its particular FMV and thus deprive it of an ability to adjust its prices accordingly to ensure that it was not selling in the United States at less than fair value.

The domestic producers also argue that Commerce should have used the percentage of profit that each company made in the United States to represent the amount of profit that each company might have made on sales in the home market or to a third country. The domestic producers assert that Commerce's non-use of United States profit figures is inconsistent with Commerce's use of general selling and administrative expenses incurred on United States sales of the merchandise under consideration as a surrogate for home market general selling and administrative expenses. Conf. R. Doc. 63.

Defendant responds that it would be patently illogical to use United States profits in determining United States price and then

use the same profits in determining FMV, because profit is usually the only variable that will generally determine whether a foreign producer is selling a product in the United States at less than fair value. According to the defendant, a product will generally cost the same to make no matter where it is ultimately sold, and if two identical items are produced on the same assembly line, their material and fabrication costs, their direct labor, storage, and factory overhead costs, and other general and administrative costs will generally be the same absent any diminishing marginal returns in production, regardless of the fact that the items are destined for different markets. The costs that will vary according to market destination are "circumstances of sale," for which Commerce must make a circumstances of sale adjustment. 19 U.S.C. § 1667b(a)(4)(b) (1982). Profit is thus a critical factor in determining whether dumping exists. If the same profit figure is used for both the determination of the United States price and FMV, then it is likely that the constructed FMV will be identical to the selling price in the United States. This would result in no dumping margins, which would not accomplish the purposes of the antidumping laws. *Defendant's Memorandum in Opposition to Plaintiffs' Motion for Judgment Upon the Agency Record,* at 15–19.

While there is not statutory prohibition on using United States profits on sales of the subject merchandise, neither is there any statutory authority commanding Commerce to use United States profits in constructing FMV. Where a statute is silent or ambiguous with respect to a specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. *National Labor Relations Bd.* v. *United Food and Commercial Workers Union,* 108 S. Ct. 413, 421 (1987). The Court finds that Commerce's use of an 8 percent profit figure is indeed based upon a permissible construction of the statute. Commerce's determination to use an 8 percent profit figure in constructing foreign value is reasonable and in accordance with law. This part of the action is affirmed.

2. *EXCLUDING DUMPING MARGINS AS DE MINIMIS*

Commerce excluded the dumping margins for Kejriwal (0.39%) and Kajaria (0.03%) as *de minimis.* On April 29, 1986 this Court held that Commerce could not deem a margin of dumping *de minimis* unless it either promulgated a rule in accordance with the Administrative Procedures Act, 5 U.S.C. § 553 (1982), or explained the basis for its decision to consider a margin *de minimis. Carlisle Tire & Rubber Co.* v. *United States,* 10 CIT ——, 634 F. Supp. 419, 422–25 (1986). Commerce has since promulgated its rules regarding *de minimis* margins. *See Antidumping and Countervailing Duties; De Minimis Dumping Margins and De Minimis Subsidies,* 52 Fed. Reg. 30,660 (Aug. 17, 1987) (regulations to be codified at 19 C.F.R. § 353.24). These rules are not retroactive to Commerce's determina-

tion of March 19, 1986, or otherwise control the outcome of the determination now before the Court. Independent of these newly-promulgated rules, Commerce may determine that a particular margin is *de minimis* if it supported by substantial evidence on the record and is otherwise in accordance with law within the meaning of 19 U.S.C. § 1516a(b)(2)(B) (1982). *Washington Red Raspberry Comm'n* v. *United States,* 11 CIT ——, 670 F. Supp. 1004, 1005, *appeal filed,* No. 88–1107/1070 (Fed. Cir. Dec. 4, 1987). Pursuant to this Court's decision in *Carlisle Tire & Rubber Co.,* the defendant asks the Court to remand this part of the action for an explanation on the record of the reasons behind Commerce's *de minimis* determinations for Kejriwal and Kajaria. If the other recalculations upon remand result in dumping margins which are no longer *de minimis,* the reasons behind the *de minimis* determinations for Kejriwal and Kajaria will be moot. If the margins remain *de minimis,* Commerce is ordered to explain the reasons for that determination as part of the remand proceedings.

3. *ALLEGED COMPUTATIONAL ERRORS*

a. *Kejriwal's Commission*

The domestic producers assert that Kejriwal reported a commission on sales to "Customer A," and argue that Commerce erred in not deducting this commission on all sales to "Customer A." Conf. R. 1486 (at line 102), 1496 (at line 191). The record discloses that no adjustment to "Customer A" was necessary because the commission was paid to "Customer F" and "Customer G." R. 1396, Conf. R. 1320. Commerce accordingly made adjustments on United States sales to "Customer F" and "Customer G." Conf. R. 1471–74. This part of the action is affirmed.

b. *Kejriwal's Inspection Charges*

The domestic producers argue that Commerce erred in not deducting an inspection charge from eleven sales of grates and frames. Commerce verified the existence of the inspection charge by examining its existence on sample sales. R. 1394, Conf. R. 1318. Commerce made no adjustment for inspection charges on the challenged eleven sales because Kejriwal did not report these charges for the eleven sales, which were not part of the sample. The record supports the conclusion that Commerce only made adjustments when inspection charges were incurred. Conf. R. 440 (at lines 37–47). This part of the action is affirmed.

4. *WITHDRAWN CLAIMS*

The domestic producers alleged that Commerce failed to correct certain data input errors for Kejriwal, and challenged the formula used to determine Kajaria's credit expenses on a transaction. The domestic producers also urged that Commerce failed to investigate a possible relationship between RSI and a confidential entity to determine whether USP should be calculated on the basis of purchase

price or the exporter's sales price. The domestic producers withdrew these assignments of error at oral argument. These parts of the action are affirmed.

5. *ISSUES FOR WHICH DEFENDANT CONSENTS TO REMAND*

In its final determination, Commerce stated that it accounted for a rebate of the excise duty drawback by adding a duty drawback to the United States Price (USP) pursuant to 19 U.S.C. § 1677a(d)(1)(B) (1982), which provides for an upward adjustment to USP for customs duties that are rebated or uncollected by reason or exportation. 51 Fed. Reg. at 9,487. The record discloses that Commerce also deducted an amount for the excise duty drawback from each respondent's foreign market value (FMV). Conf. R. 65–69. The plaintiffs assigned as error Commerce's counting of the same taxes as both a duty drawback adjustment to USP and a reduction in material costs in the constructed FMV. In *Serampore Indus.* v. *United States*, 11 CIT ——, 675 F. Supp. 1354, 1357 (1987), this Court remanded this issue to Commerce for recalculation as to Serampore only. Consistent with *Serampore*, Commerce asks this Court to remand this issue for recalculations as to RSI, Kejriwal, and Kajaria. This part of the action is remanded.

The domestic producers also assign as error Commerce's failure to make an adjustment for physical difference in merchandise. During verification, Commerce discovered that at least one of the respondents sold castings with nuts and bolts. R. 1429. The domestic producers assert that the addition of nuts and bolts increases the cost of the merchandise, *Plaintiffs' Memorandum in Support of Motion for Judgment on the Administrative Record*, at 36–37, and argue that disregarding the physical difference in material costs in constructing FMV is inconsistent with the antidumping law, Commerce's regulations, and Commerce's prior practice. *See* 19 U.S.C. § 1677b(a)(4)(C) (1982); 19 C.F.R. § 353.16 (1986). At oral argument the defendant agreed to make the requested recalculation upon remand. This part of the action is remanded.

The domestic producers challenge the inclusion in Commerce's final analysis of one of RSI's reported United States sales because that sale had been cancelled, and assert that Commerce improperly calculated certain United States selling and movement expenses for RSI. The domestic producers also assert that Commerce verified that a certain transaction involved the sale of light castings, but that Commerce mistakenly classified these castings as heavy castings on line 107 of Commerce's final computer printout. Conf. R. 1254, 1591. At oral argument the defendant consented to a remand on these issues to correct the challenged figures. These parts of the action are remanded.

The domestic producers also contest Commerce's treatment of indirect taxes rebated to Kejriwal under the Cash Compensatory Sup-

port (CCS) program. R. 1394–95. Commerce added both the CCS payment and the excise duty drawback to USP. Commerce concedes that an upward adjustment to USP was improper, and asks the Court to remand. This part of the action is remanded.

6. *RELIEF BEYOND THE COMPLAINT AND PRAYER FOR RELIEF*

The domestic producers assert that during verification in India, Commerce determined that Serampore had incorrectly reported the number of pieces involved in certain transactions. Defendant informed the Court at argument that correction of this error would require sending another verification team to India. The Court does not reach this contention against Serampore in the absence of defendant's consent. The domestic producers' complaint is expressly limited to challenging Commerce's final determinations for RSI, Kejriwal, and Kajaria. Complaint at 4. Serampore's dumping margin is the subject of *Serampore Indus.* v. *United States,* 11 CIT ——, 675 F. Supp. 1357 (1987). In the absence of the defendant's consent, the Court declines to order relief outside the scope of the domestic producers' complaint and request for relief when the remedy would entail great expense in conducting another verification in India.

7. *RELIEF OUTSIDE THE JURISDICTION OF THE COURT*

The Indian exporters move the Court to remand for recalculation of the Indian central sales tax, consistent with the government's consent to a remand on the same issue in *Serampore Indus.,* 11 CIT at ——, 675 F. Supp. at 1357–58.

Judicial authority supports granting a request for remand if it fosters and promotes fundamental fairness. *ILWU Local 142* v. *Donovan,* 12 CIT ——, 678 F. Supp. 307, 310 (1988). Additionally, Rule 1 of the Rules of this Court provides that the Rules of the Court "shall be construed to secure the just, speedy, and inexpensive determination of every action."

RSI, Kejriwal, and Kajaria had not previously contested Commerce's treatment of the central sales tax because no affirmative dumping finding was entered against them. As a general rule, a prevailing party in an administrative proceeding may not appeal the proceeding only because it disagrees with some of the findings or reasoning. *Freeport Minerals Co.* v. *United States,* Fed. Cir. (T) 114, 119, 758 F.2d 629, 634 (1985).

Although the Court is sympathetic to the plea that denial of the motion would cause undue delay if the remand results produce actionable dumping margins against RSI, Kejriwal and Kajaria, the Court finds that it lacks jurisdiction to order a remand in this case for the recalculation of the tax incidence on castings produced by RSI, Kejriwal and Kajaria. These exporters intervened "for the purpose of defending [Commerce's] determination that Kejriwal, Kajaria, and RSI are not selling certain iron construction castings to the U.S. at less than fair value." Motion to Intervene, filed July

2, 1986. This Court has consistently held that it lacks jurisdiction over a challenge to a Commerce determination made by an intervenor when the challenge is made subsequent to the thirty day deadline under 19 U.S.C. § 1516a(a)(2) for instituting an action. *National Ass'n of Mirror Mfgs.* v. *United States,* 11 CIT ——, 670 F. Supp. 1013 (1987); *Washington Red Raspberry Comm'n* v. *United States,* 11 CIT ——, 657 F. Supp. 537, 545–46 (1987); *East Chilliwack Fruit Growers Cooperative* v. *United States,* 11 CIT ——, 655 F. Supp. 499, 504–05 (1987); *Al Tech Specialty Steel Corp.* v. *United States,* 10 CIT ——, 633 F. Supp. 1376, 1380 (1986); *Fuji Elec. Co.* v. *United States,* 7 CIT 247, 595 F. Supp. 1152, *appeal dismissed,* No. 84–1639 (Fed. Cir. 1984); *Nakajima All Co.* v. *United States,* 2 CIT 170 (1981). The Indian exporters did not commence an action to challenge Commerce's findings as to RSI, Kejriwal, and Kajaria. They raised the issue concerning the recalculation of the tax incidence incurred on their castings for the first time in response to plaintiffs' motion for judgment upon the agency record. Under the cases and statutory framework, the Court must deny the Indian exporters' motion. However, if remand results from the other issues lead to finding a level of dumping which warrants imposition of an antidumping duty, then RSI, Kejriwal, and Kajaria will suffer from a legally cognizable injury which would allow them to institute an action to contest the remand results pursuant to 28 U.S.C. § 1581(c) (1982), as provided in 19 U.S.C. § 1516a. *See Al Tech Specialty Steel Corp.,* 10 CIT ——, 633 F. Supp. 1376, 1380 (1986).

Conclusion

This action is remanded to Commerce to make the appropriate explanations on the record or recalculations within 30 days. The domestic producers are granted 15 days after receipt of the remand results in which to file a brief. Defendant-intervenors and Commerce are each granted 10 days after receipt of the domestic producers' brief in which to file a reply.

ABSTRACTED CLASSIFICA

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED
				Item No. and rate
C88/63	DiCarlo, J. April 18, 1988	North American Foreign Trading Corp.	81-2-00135, etc.	Item 720.28 5¢ each + 10% or 4.8¢ each + 9.8% Item 720.24 20¢ each + 15% or 18.5¢ each + 13.9% Item 720.75 14¢ per set or 20.8%
C88/64	DiCarlo, J. April 19, 1988	Pharmacia, Inc.	74-4-00965, etc.	Item 711.88 15% or 11%
C88/65	DiCarlo, J. April 19, 1988	Pharmacia, Inc.	80-10-01669, etc.	Item 711.88 10.4% or 11%
C88/66	DiCarlo, J. April 19, 1988	Pharmacia, Inc.	81-1-00033, etc.	Item 711.88 9.8% or 11% Item 711.7840 6.4%
C88/67	DiCarlo, J. April 19, 1988	Pharmacia, Inc.	84-1-00020 etc.	Item 711.88 8.6% or 9.8% Item 711.78 5.4%

HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
Item No. and rate		
Item 657.25 9.5% or 9% Item 656.25 25% or 23.1% Item 656.35 12% or 11.3% Item 685.90 8.5% or 8.1%	Agreed statement of facts	New York Chrome-plated watch cases, Gold-plated or silver-plated wach cases, pushers, push-buttons, or buttons
Item 661.95 5.5% or 8%	Pharmacia Fine Chemicals, Inc. *v.* U.S., 9 CIT 438 (1985)	New York Columns
Item 661.95 5.3% or 5.5%	Pharmacia Fine Chemicals, Inc. *v.* U.S., 9 CIT 438 (1985)	New York Columns
Item 661.95 5.5% or 5.1% Item 678.50 Various rates Item 661.68 Various rates Item 682.60 Various rates Item 774.55 Various rates	Pharmacia Fine Chemicals, Inc. *v.* U.S., 9 CIT 438 (1985)	New York Columns or similar products or parts thereof
Item 661.95 4.7% or 5.1% Item 774.55 7.7% Item 712.49 7.5%	Pharmacia Fine Chemicals, Inc. *v.* U.S., 9 CIT 438 (1985)	New York Columns

ABSTRACTED CLASSIFICATION DE

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	
				Item No. and rate	Ite
C88/68	Tsoucalas, J. April 20, 1988	Consolidated Diesel Co.	85-11-01554 etc.	Item 660.71 Various rates	Item Fr
C88/69	Tsoucalas, J. April 21, 1988	Hewlett-Packard Co.	87-9-00961	Item 712.05 11.9% or 10%	Item 5.5

ECISIONS — Continued

HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
em No. and rate		
m 660.64 ree of duty	Agreed statement of facts	Port Huron Cast iron engine parts for internal combustion engines
m 712.49 .5% or 4.9%	EAC Engineering *v.* U.S., 9 CIT 534 (1985)	Philadelphia Major subassemblies and parts of liquid chromatographs

ABSTRACTED VALUAT

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	
V88/37	Tsoucalas, J. April 13, 1988	Puma, USA,	86-12-01640	Export value or American selling price or transaction value	$
V88/38	DiCarlo, J. April 20, 1988	Old Republic Insurance Co.	83-10-01525	Transaction value	E
V88/39	Tsoucalas, J. April 25, 1988	Puma USA, Inc.	84-5-00663	Export value or American selling price	$

TION DECISIONS

HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
$4.57 per pair net packed, or $4.72 per pair net packed or $10.80 per pair less 2% or $4.30 per pair net packed	Agreed statement of facts	Savannah Footwear
Entered value as shown on commercial invoices included on official entry documents	Agreed statement of facts	Detroit Wearing apparel
$13.20 per pair less 2% packed or $6.40 per pair plus 5%, etc.	Agreed statement of facts	Los Angeles Footwear

Appeals to the U.S. Court of Appeals for the Federal Circuit

NEC America, Inc. *v.* United States, 11 CIT ——, Slip Op. 87-139 (Dec. 18, 1987), *appeal docketed,* No. 88-1258 (Fed. Cir. Feb. 23, 1988).

Alyeska Pipeline Service Co. *v.* United States, 11 CIT ——, Slip Op. 87-137 (Dec. 10, 1987), *appeal docketed* No. 88-1285 (Fed. Cir. March 10, 1988).

United States *v.* American Motorists Ins. Co., 11 CIT ——, Slip Op. 87-141 (final judgment, Jan. 6, 1988), *appeal docketed,* No. 88-1284 (Fed. Cir. March 10, 1988).

Rosenthal-Netter, Inc. *v.* United States, 11 CIT ——, Slip Op. 88-9 (Jan. 28, 1988), *appeal docketed* No. 88-1294 (Fed. Cir. March 16, 1988).

United States *v.* F.H. Fenderson, Inc., 11 CIT ——, Slip Op. 87-108 and courts orders (Sept. 25, 1987 and Jan. 12, 1988), *appeal docketed,* No. 88-1299 (Fed. Cir. March 17, 1988).

Schott Optical Glass, Inc. *v.* United States, 11 CIT ——, Slip Op. 87-132 (Dec. 7, 1987), *appeal docketed* No. 88-1326 (Fed. Cir. April 8, 1988).

Tomoegawa USA, Inc. *v.* United States, 12 CIT ——, Slip Op. 88-17 (Feb. 10, 1988), *appeal docketed,* No. 88-1354 (Fed. Cir. April 22, 1988).

Washington Int'l Ins. Co. *v.* United States, 12 CIT ——, Slip Op. 88-4 (Jan. 12, 1988), *appeal docketed,* No. 88-1334 (Fed. Cir. April 11, 1988).

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E.C. McAffee Co. *v.* United States, 11 CIT ——, Slip Op. 87–32 (March 20, 1987), *rev'd,* No. 87-1441 (Fed. Cir. March 1, 1988).

Omni U.S.A. Inc. *v.* United States, 11 CIT ——, Slip Op. 87–77 (June 30, 1987), *aff'd,* No. 87-1602 (Fed. Cir. March 2, 1988).

Fundicao Tupy S.A. *v.* United States, 11 CIT ——, Slip Op. 87–93 (Aug. 5, 1987), *dismissed,* No. 87–1570 (Fed. Cir. March 14, 1988).

Nissho Iwai American Corp. *v.* United States, 11 CIT ——, Slip Op. 87–38 (March 31, 1987), *aff'd,* No. 87–1388 (Fed. Cir. March 16, 1988).

Springfield Industries *v.* United States, 11 CIT ——, Slip Op. 87–56 (May 11, 1987), *rev'd,* No. 87–1469 (Fed. Cir. March 29, 1988).

Burroughs Corp. *v.* United States, 11 CIT ——, Slip Op. 87–50 (April 15, 1987), *aff'd,* No. 87–1404 (Fed. Cir. April 26, 1988).

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